American Bar Association Journal

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1951 ANNUAL MEETING

NEW YORK, N. Y., SEPTEMBER 17-21, 1951

The Seventy-Fourth Annual Meeting of the American Bar Association will be held in New York City, September 17 to 21, 1951. Further information with respect to the meeting will be published in the JOURNAL from time to time.

In requesting reservations, please note the necessity of remitting the registration fee and of furnishing information as to your preference in hotels (first, second and third choice), definite arrival date and whether such arrival will be during the day or evening, and probable date of departure.

Applications for reservations will be accepted only from members of the Association and their guests.

Reservation confirmations will be mailed approximately ninety days before the meeting convenes.

HOTEL RESERVATIONS

HEADQUARTERS HOTEL — WALDORF-ASTORIA

(Because of shortage of rooms for single occupancy, please arrange to share double room with another, whenever possible.)

ALL ROOMS WITH PRIVATE BATH

Hotel	*For One Person*	*For Two Persons*		*Parlor, Bedroom & Bath*
	Single	*Double-Bed*	*Twin-Beds*	
AMBASSADOR *(Park Ave. & 51st St.)*			$11.00-$16.00	$18.00-$32.00
BARCLAY *(111 East 48th St.)*			14.00	22.00
BELMONT PLAZA *(Lexington Ave. & 49th St.)*	$ 5.50-$ 6.50	$ 8.00-$ 9.00	8.50- 9.50	13.00- 16.00
BILTMORE *(Madison Ave. & 43d St.)*	8.00- 10.50	11.00- 13.00	13.00- 16.00	30.00- 34.00
COMMODORE *(Lexington Ave. & 42d St.)*	6.00- 8.00	9.00- 10.00	10.50- 12.50	16.00- 28.00
LEXINGTON *(Lexington Ave. & 47th St.)*	6.50- 7.00	9.50- 10.50	10.50- 11.00	16.00- 18.00
NEW WESTON *(34 East 50th St.)*	5.00- 9.00		9.00- 14.00	14.00- 25.00
NEW YORKER *(Eighth Ave. & 34th St.)*	5.00- 8.00	9.00- 14.00	9.00- 14.00	
PARK SHERATON *(Seventh Ave. & 56th St.)*	5.00- 9.00	8.00- 12.00	8.00- 12.00	10.00- 26.00
PLAZA *(Fifth Ave. & 59th St.)*	8.00- 12.00		10.00- 20.00	26.00- 34.00
ROOSEVELT *(Madison Ave. & 45th St.)*	7.00- 10.00	11.50- 13.50	12.50- 15.00	24.00- 30.00
SHELTON *(Lexington Ave. & 49th St.)*	5.00- 7.00	7.00- 10.00	7.50- 10.00	10.00- 15.00
STATLER *(Seventh Ave. & 33d St.)*	5.00- 8.00	8.00- 10.50	9.00- 17.00	18.00- 27.00
WARWICK *(65 West 54th St.)*	8.00- 12.00		10.00- 14.00	20.00- 25.00
WALDORF-ASTORIA *(Park Ave. & 50th St.)*		(Space exhausted)		

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed, to be occupied by ONE person. A double room contains a double (one) bed, to be occupied by TWO persons. A twin-bed room will NOT be assigned for occupancy by one person. A parlor suite consists of sitting-room and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the sitting-room.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating HOTEL (FIRST, SECOND AND THIRD CHOICE); number and type of room or rooms required; names and addresses of all persons who will occupy same; definite arrival date and whether such arrival will be during the day or evening; and probable date of departure.

As it is not possible to designate definite rates with respect to hotel accommodations, please indicate approximate rate desired, and we will endeavor to comply with your request, if possible.

Members who expect to arrive on early morning trains can avoid inconvenience of waiting for rooms by having reservations made for preceding evening and by paying for one additional day. Rooms reserved for morning arrival cannot be made available before midafternoon, unless voluntarily vacated by last occupant.

REGISTRATION FEE

REQUESTS FOR RESERVATIONS FOR HOTEL ACCOMMODATIONS SHOULD BE ACCOMPANIED BY PAYMENT OF THE REGISTRATION FEE IN THE AMOUNT OF $5.00 FOR EACH MEMBER. The Board of Governors solicits the cooperation of the members of the Association in thus facilitating the handling of the registration fee and in partially defraying the increasing expense of the Annual Meeting. In the event that it becomes necessary to cancel a hotel reservation, the registration fee will be refunded, PROVIDED NOTICE OF CANCELLATION IS RECEIVED AT CHICAGO HEADQUARTERS NOT LATER THAN AUGUST 27, 1951. ALL UNASSIGNED SPACE WILL BE RELEASED TO THE RESPECTIVE NEW YORK HOTELS, BY THE ASSOCIATION, ON AUGUST 27, 1951, AFTER WHICH DATE RESERVATIONS MAY BE MADE, BY INDIVIDUAL MEMBERS, WITH HOTELS DIRECTLY.

REQUESTS FOR RESERVATIONS, TOGETHER WITH $5.00 REGISTRATION FEE FOR EACH MEMBER FOR WHOM RESERVATION IS REQUESTED, SHOULD BE ADDRESSED TO THE RESERVATION DEPARTMENT, AMERICAN BAR ASSOCIATION. 1140 North Dearborn St., Chicago 10, Illinois.

Revised from AMERICAN BAR ASSOCIATION JOURNAL, *February 1951 issue.*

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Gilbert H. Montague Ponders Effect of New Anti-merger Act

On December 29, 1950, President Truman signed the Celler Anti-Merger Bill, changing the law as to prohibited business mergers under Section 7 of the Clayton Act. Gilbert H. Montague, of the New York Bar, declares that the approval of this bill dropped into the lap of the Federal Trade Commission "an administrative problem fraught with grave difficulties and perplexities, which if not speedily and correctly solved by the Commission, may cast a paralyzing weight of uncertainty upon the economy at just the time when it is bearing all the strains and stresses of the greatest national emergency in history". Mr. Montague's article is a study of the problems raised by the new legislation, viewed in the light of the reports of the discussions of its provisions in the Senate and the House before it was enacted. (Page 253.)

John C. Cooper Discusses Crimes Aboard Aircraft

There are two questions about crimes committed aboard American aircraft that are unanswered under existing statutes: Are crimes committed in United States aircraft flying abroad punishable under federal statutes relating to federal admiralty and maritime jurisdiction? Is the navigable air space above the United States federal or state territory for the purposes of exercising criminal jurisdiction? John C. Cooper examines these problems in detail and urges that legislation be adopted to clarify the law concerning them. (Page 257.)

Judge Harold M. Stephens Reminds Us That Citizenship Is Our True Vocation

President Coolidge once told the Brigade of Midshipmen at Annapolis that the "real profession of every American is citizenship". Chief Judge Harold M. Stephens of the United States Court of Appeals for the District of Columbia recalls those words of the twenty-ninth President in an article in this issue. We have achieved a government of liberty and order, he writes, but unless the American people practice their profession of citizenship, the Constitution and American institutions cannot function. He recalls that only half the eligible voters exercise their right to vote in Presidential elections, that a federal court was recently attacked when it performed its duty to administer justice according to the law and without respect of persons, and that thousands of our students have had no courses in either history or government. The Constitution will not fail the people, he says grimly, but if these trends continue, the people may fail their Constitution. (Page 261.)

Tribute Paid Lawyers-at-Arms by Admiral Denfeld

In a speech delivered during the last Annual Meeting of the Law Society of Massachusetts, Admiral Denfeld told of the Navy's operation, during the war years, of one of the largest law firms ever to engage in the practice of law. The Admiral said the Navy owes a vast debt of gratitude to lawyers of this nation for professional services rendered. He referred to war work of Navy lawyers—both civilian and uniformed. (Page 277.)

Southeastern Regional Convention a Red-Letter Event

As was demonstrated by the Southeastern regional convention, held in Atlanta, Georgia, March 7-10, these regional meetings will serve to stimulate interest in bar activities and bring the Association itself nearer to members. Under the leadership of General Chairman E. Smythe Gambrell, of Atlanta, and the cooperation of the members of the various supporting committees from the seven southeastern states, approximately 700 paid registrants were given, in three days, a full and well balanced program of addresses, workshop lectures and round-table discussions. (Page 265.)

State Delegates Make Nominations at Mid-Year Meeting

Candidates were nominated, by the State Delegates, at the Mid-Year Meeting in Chicago on February 27, for the office of President, Secretary, Treasurer and four posts on the Board of Governors. Nominees will be voted upon by the Assembly at the next Annual Meeting. Howard L. Barkdull, a native of Ohio, who has been active in bar association work for many years, has been nominated for the presidency. (Page 266.)

Survey Requests Reply to Questions on Origin of Bar Associations

Dean Roscoe Pound states, in writing a report for the Survey of the Legal Profession, that the basic data about the origin of early bar associations have never been sufficiently assembled. You can help Dean Pound and the Survey by persuading your bar association to answer (if they haven't) the three questions asked by the Survey regarding the founding of your bar association. (Page 272.)

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American Bar Association 1950-51

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Persons eligible for membership in the Association may become such on being proposed in writing by a member, approved by the Committee on Admissions for his State, and elected by the Board of Governors (Constitution, Article II, Section I; By-laws, Article I, Section 1). Dues are $12.00 a year, except for the first two years after his or her admission to the Bar, the dues of a member are $3.00 per year, and for three years thereafter $6.00 per year. Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

(Continued from Page III)

Income Tax Credit Proposed To Solve Health Insurance Problem

Sol M. Linowitz, of the New York Bar, proposes that the current battle over compulsory national health insurance be ended by a compromise. He would allow a federal income tax credit for premiums paid for private health insurance, arguing that this would eliminate the dangers of the compulsory program by inducing citizens to provide themselves with adequate health insurance. He declares that his plan would eliminate the terrific cost of administration of compulsory insurance and at the same time avoid the danger of destroying the doctor-patient relationship. (Page 273.)

Mid-Year Proceedings of House of Delegates

All of the members of our Association should read carefully the proceedings of the mid-year meeting of the House of Delegates of our Association, held in Chicago on February 26-27. Many of the actions voted are of far-reaching significance to American lawyers and to the American public whom they serve. (Page 309.)

The Celler Anti-Merger Act:

An Administrative Problem in an Economic Crisis

by Gilbert H. Montague • of the New York Bar (New York City)

■ The Celler Anti-Merger Act, approved last December, widens the scope of Section 7 of the Clayton Act so as to prevent mergers of businesses "where in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition", etc. Mr. Montague says that this is a great change in our antitrust laws, coming at a time when our national economy is subjected to a tremendous strain. He expresses the hope that the Federal Trade Commission, charged with the responsibility of enforcing the new act, will act promptly to interpret and apply the new provisions so as to prevent the chaos that might come from uncertainty as to their meaning.

■ When the President on December 29, 1950, approved the Celler Anti-Merger Bill,[1] he dropped into the lap of the Federal Trade Commission an administrative problem fraught with grave difficulties and perplexities, which if not speedily and correctly solved by the Commission, may cast a paralyzing weight of uncertainty upon the economy at just the time when it is bearing all the strains and stresses of the greatest national emergency in history.

The Celler Act amends the original Clayton Act Section 7[2] as follows (new portions of the statute are printed in italics; portions deleted by the Celler Act are printed in small capital letters):

> *That* no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition may be TO substantially *to* lessen competition, BETWEEN THE CORPORATION WHOSE STOCK IS SO ACQUIRED AND THE CORPORATION MAKING THE ACQUISITION, OR TO RESTRAIN SUCH COMMERCE IN ANY SECTION OR COMMUNITY, OR *to* tend to create a monopoly OF ANY LINE OF COMMERCE.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of *one* TWO or more corporations engaged in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition, *of such stocks or assets,* or *of* the use of such stock by the voting or granting of proxies or otherwise, may be TO substantially *to* lessen competition, BETWEEN SUCH CORPORATIONS, OR ANY OF THEM, WHOSE STOCK OR OTHER SHARE CAPITAL IS SO ACQUIRED, OR TO RESTRAIN SUCH COMMERCE IN ANY SECTION OR COMMUNITY or *to* tend to create a monopoly OF ANY LINE OF COMMERCE.

Under the Celler Act, as under the original Clayton Act,[3] the Attorney General and the Federal Trade Commission are each empowered to enforce Clayton Act Sections 2, 3, 7 and 8 against all corporations subject to the Commission's jurisdiction.

Traditionally, however, the Commission, rather than the Attorney General, has been the usual governmental agency that exercises this power.

Celler Act Strengthens Tradition of Commission Enforcement

This tradition is now strengthened by the provision in the Celler Act which amends the original Clayton Act Section 11 by expressly authorizing the Attorney General to intervene and appear in any proceeding by the Commission exercising this power.

The problem therefore of speedily and correctly interpreting and applying Clayton Act Section 7 as now amended by the Celler Act today rests squarely upon the Commission, and time is of the essence, not only because of the present national emergency, but also because the Attorney General may "institute proceedings in equity to prevent such violations", and because anyone claiming "threatened loss or damage" on account of any acquisition of stock or assets in violation of this amended section may sue the acquiring company for an injunction or for "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee", "in any district wherein it may be found or transacts business".[4]

Obviously Clayton Act Section 7 as now amended by the Celler Act

1. Public Law 899, 81st Cong., c. 1184—2d Sess., H.R. 2734 (hereinafter called "Celler Act").
2. 38 Stat. 731-732; 15 U.S.C. §18.
3. 38 Stat. 734, 736-737; 15 U.S.C. §§21, 25.
4. 38 Stat. 731, 736, 737; 15 U.S.C. §§15, 22, 26.

does vastly more than merely bring asset acquisitions under the same prohibition as the original Clayton Act provided in respect of stock acquisitions.

The winning slogan of the Celler Bill, which became the Celler Act, that it "plugs a loop-hole" in the original Clayton Act Section 7 which Congress was too negligent or careless to see when Congress enacted the original Clayton Act in 1914,[5] is a gross understatement of what the Celler Act does and was intended to do.

The original Clayton Act Section 7 forbade a stock acquisition only when its effect "may be" (a) "to restrain . . . commerce in any section or community"; or (b) "to . . . tend to create a monopoly of any line of commerce"; or (c) "to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition"; or (d) "to substantially lessen competition between" "two or more corporations" "whose stock is so acquired".

Since (a) and (b) above merely paraphrase Sherman Act Section 1 and Section 2, as those sections have been interpreted by the Supreme Court, it followed that in the original Clayton Act, so far as (a) and (b) are concerned, the words "may be" simply expanded and extended into the realm of probability (or even possibility)[6] the prohibitions of Sherman Act Section 1 and Section 2.

Under the original Clayton Act, also, the only problem in (c) and (d) above was to ascertain whether "competition" "may be" "substantially lessened" in a single line of commerce, *viz.*: "competition between the corporation whose stock is so acquired and the corporation making the acquisition" (see (c) above); or "competition between" "two or more corporations" "whose stock is so acquired" (see (d) above).

The Celler Act now changes all this, and forbids any stock acquisition or asset acquisition where the effect "may be" (e) "to tend to create a monopoly" "in any line of commerce in any section of the country"; or (f) "substantially to lessen competition" "in any line of commerce in any section of the country."

Celler Act Broadens Scope of Prohibited Mergers

Under the Celler Act, therefore, it is no longer sufficient to examine merely whether there "may be" a "substantial lessening" of the "competition between the corporation whose stock [or assets are] so acquired and the corporation making the acquisition" (see (c) above); or the "competition between" "two or more corporations" "whose stock [or assets are] so acquired" (see (d) above).

Under the Celler Act, it now becomes necessary to examine whether, as the result of the particular acquisition of stock or assets, "competition" "may be" "substantially lessened" "in any line of commerce in any section of the country".

The reasons for this great expansion in the Celler Act of the number and the extent of all the various fields of competition that now must be examined, before anyone can tell whether "competition" has anywhere been "substantially lessened", and whether the merger is therefore unlawful, have been copiously stated.

Thus in the House Report accompanying the Celler Bill, which became the Celler Act, it was stated:[7]

> Mergers and acquisitions have traditionally been designated as horizontal, vertical, and conglomerate. Horizontal acquisitions are those in which the firms involved are engaged in roughly similar lines of endeavor; vertical acquisitions are those in which the purchase represents a movement either backward from or forward toward the ultimate consumer; and conglomerate acquisitions are those in which there is no discernible relationship in the nature of business between the acquiring and acquired firms.

Continuing, the House Report explained that the Celler Bill, which became the Celler Act,[8]

> applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.
>
> If, for example, one or a number of raw-material producers purchases firms in a fabricating field [*i. e.*, a "forward vertical" acquisition], and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring [raw material] and the acquired [fabricating] firms.
>
> The same principles would, of course, apply to backward vertical and conglomerate acquisitions and mergers.

The Celler Bill, the Senate Report explained, forbids[9]

> acquisitions which substantially lessen competition . . . if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.

What does the Celler Act mean by "in any section of the country"?

On this question Congressman Celler was a discouraging witness. Six weeks before he led the debate in the House of Representatives, which resulted in passing the Celler Bill containing this language, Congressman Celler scathingly criticized similar language in the so-called Willis Amendment to the so-called O'Mahoney Bill, S. 1008, to amend the Clayton Act in respect of pricing practices. Congressman Celler then called this language "new phraseology", and "loaded with dynamite", and stated[10] that it

> "would give rise to all manner of questions, of controversies, and of disputes; there would be nothing but confusion. It would mean a field day for the

5. See December 29, 1950, release by Congressman Celler "Celler Hails New Anti-Merger Law", and December 29, 1950, release containing Statement by the President when he approved the Celler Bill. The reason why Congress intended that the original Clayton Act Section 7 should not regulate acquisitions of assets was stated in August, 1914, 51 Cong. Rec., Part 14, 14312 *et seq.* and 15818 *et seq.*, and in the reports on the Clayton Bill in the House and the Senate in 1914, 63d Cong., 2d Sess., House Judiciary Committee Report No. 627 and Senate Judiciary Committee Report No. 698. See also *F.T.C. v. Western Meat Co., Thatcher Manufacturing Co. v. F.T.C.*, 272 U.S. 554, 561 (1926).

6. See *Trade Com. v. Morton Salt Co.*, 334 U.S. 37, 46, 49-50, 55-58 (1948).

7. House of Representatives Report No. 1191, 81st Cong. 1st Sess. (hereinafter called "House Report"), 11.

8. House Report, 11.

9. Senate Report No. 1775, 81st Cong., 2d Sess. (hereinafter called "Senate Report"), 5.

10. July 7, 1949, 95 Cong. Rec., Part 7, 9061, 9064.

lawyers", and "would give rise to endless litigation".

But the House Report took a different view of this language, and called the Celler Bill "less restrictive",[11] because in place of the words "in any section or community" in the Clayton Act, the Celler Bill substituted the words "in any section of the country".

Discussing this language, the Senate Report stated:[12]

> Another step which had the same general effect is also to be found in the legislative history of the present bill. As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened ". . . in any community . . ." of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.
>
> . . . [An] acquisition is not to be interpreted merely in terms of either its effect on competition or its tendency to create a monopoly "in the Nation as a whole." The act is to be violated if, as a result of an acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly in any section of the country.

Continuing, the Senate Report stated:[13]

> Although it is, of course, impossible to define rigidly what constitutes a "section of the country," certain broad standards reflecting the general intent of Congress can be set forth to guide the Commission and the courts in their interpretation.
>
> What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.
>
> As the Supreme Court stated in *Standard Oil Co.* v. *U.S.* (337 U.S. 293), "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."
>
> In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.
>
> It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well.

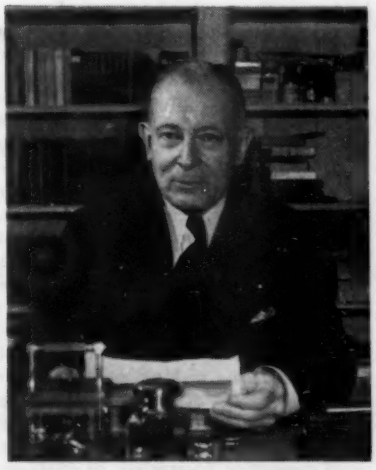
What does the Celler Act mean by "may be substantially to lessen competition"?

On this question Senator O'Mahoney was another discouraging witness. Senator O'Mahoney joined with Senator Kefauver in introducing in the Senate in January, 1949, the companion bill to the Celler Bill. Senator O'Conor, Senator O'Mahoney and Senator Kefauver led the debate in the Senate in December, 1950, which resulted in passing the Celler Bill containing the above language. But in August, 1949, Senator O'Mahoney was greatly displeased with the above language, as compared with the phrase "will be to substantially lessen competition", and in the Senate debate on August 12, 1949, on the motion to reconsider the vote to send to conference the so-called O'Mahoney Bill S. 1008 hereinabove mentioned, to amend the Clayton Act as regards pricing practices, Senator O'Mahoney stated:[14]

> Mr. President, the difference between the word "will" and the word "may" is almost as great as the distinction between the poles. . . . I prefer the word "will" to the word "may"; because if we use the word "may", no one under the sun can tell what the law means, because "may" conveys into the hands of some future Federal Trade Commission the power to hold these two practices to be illegal, although the Federal Trade Commission now says they are not illegal. That is all in the world that this bill proposes to do. . . . Do Senators wish to go beyond that, and say, "We are not satisfied with the requirement that there will not be injury to competition. We want something more. We want the Federal Trade Commission to be able to say, 'Well, perhaps there is no present injury, but perhaps there may be some injury in the future'?"

Discussing the words "may be substantially to lessen competition" the House Report stated:[15]

> Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.
>
> Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition



Gilbert H. Montague was Vice Chairman of the Committee on Monopolies and Restraints of Trade of the Section of Corporation, Banking and Business Law in 1947-1948 and since 1949 has been Chairman of the Section's Committee on Federal Trade Commission. A lawyer with long experience in the antitrust field, Mr. Montague testified before Congress regarding bills that were predecessors of the Celler Bill and on that legislation itself.

11. House Report, 5, 6.
12. Senate Report, 4, 5.
13. Senate Report, 5-6.
14. Aug. 12, 1949, 95 Cong. Rec., Part 9, 11344.
15. House Report, 8.

but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

Continuing, the House Report stated that under the Celler Bill, which became the Celler Act,[16]

> it would be unnecessary for the Government to speculate as to what is in the "back of the minds" of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered to be unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices.
>
> The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a Nation-wide or industry-wide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country.
>
> The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition, such as, for example, lease of assets. It forbids not only direct acquisitions but also indirect acquisitions, whether through a subsidiary or affiliate or otherwise.

Discussing the words "may be substantially to lessen competition" the Senate Report stated that these words "would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act."[17]

This statement in the Senate Report is highly important, because prior thereto in May, 1948, the Supreme Court held that the phrase "may be substantially to lessen competition" in Clayton Act Section 2, price discriminations, empowers the Federal Trade Commission to find "lessening of competition" whenever there is "any reasonable possibility" (not probability) of such "lessening"[18].

Continuing, the Senate Report stated:[19]

> The words "may be" have been in Section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.

Commenting on the original Clayton Act Section 7, and "the tendency of the courts in cases under that section to revert to the Sherman Act test", the Senate Report stated[20] that

> it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

The Senate Report then quoted with approval this statement of the Federal Trade Commission:[21]

> Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them. . . .
>
> Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival . . . (The Merger Movement, A Summary Report, pp. 6-7).

Both the House Report and the Senate Report emphasized that the Celler Bill, which became the Celler Act, does not forbid all acquisitions of stock or assets from a competing company.

Thus the House Report stated that "This bill is not intended to prohibit all acquisitions among competitors."[22]

The House Report mentioned "The objection that the suggested amendment would prohibit small companies from merging . . ." and stated:

> There is no real basis for this objection.
>
> In the first place, the present language of Section 7 as it relates to mergers by sale of stock is more restrictive than the language in the amended bill. Yet no case has been found where a small corporation had any difficulty or was criticized by the Federal Trade Commission for selling its business by selling its stock to another small corporation. The small corporations have not had to avoid the present language of Section 7 by selling their assets in place of their stock, when they wanted to dispose of their business.
>
> Furthermore, the Supreme Court and the Federal courts have not applied the present strict language of Section 7, even in cases of stock acquisition, so as to prevent a small corporation from selling its business or merging with another small business. The Supreme Court has only applied the present language of Section 7, even in the case of stock acquisitions, to large transactions which would substantially lessen competition, or tend to create a monopoly. In

(Continued on page 324)

16. House Report, 8-9.
17. Senate Report, 6.
18. See *Trade Com.* v. *Morton Salt Co.*, 334 U.S. 37, 46, 49-50, 55-58 (1948).
19. Senate Report, 6.
20. Senate Report, 4-5.
21. Senate Report, 5.
22. House Report, 11.

Crimes Aboard American Aircraft:

Under What Jurisdiction Are They Punishable?

by John C. Cooper • of the Institute for Advanced Study, Princeton, New Jersey

■ In March, 1950, a federal judge held that crimes committed aboard an American plane flying over the high seas were not punishable as violations of federal law. This raises the problems that Mr. Cooper discusses in this article. Are crimes committed in United States aircraft flying abroad punishable under federal statutes relating to federal admiralty and maritime jurisdiction? Is the navigable air space above the United States federal or state territory for the purposes of exercising criminal jurisdiction?

■ Criminal jurisprudence should be exact in its definition of what constitutes a crime and completely clear in its statement as to the courts competent to impose punishment. Unfortunately such is not the case as to crimes committed on board United States aircraft in flight over foreign territory, over the high seas, over the territorial waters adjacent to the United States, and even over the lands of the several states of the Union. This is a situation which must be remedied, accurately and without further delay.

Present confusion arises in part from the failure of the Congress, and perhaps of the several states, to enact needed legislation; in part, from the present confused status of the marginal sea (territorial waters) adjacent to the several states, due to the inconclusive statements of the Supreme Court of the United States in the California, Louisiana and Texas submerged sea-lands cases; and in part, from the doubt which now exists as to whether navigable air space above the several states of the Union is part of the territory of the respective subjacent states or is under exclusive federal jurisdiction.

The legal status of the air space is now well understood in international law. If any area on the surface of the earth, land or water, is recognized as part of the territory of a nation, then the air space over such surface area is also part of the territory of the same nation. Conversely, if an area on the earth's surface is not part of the territory of any nation, such as the water areas ordinarily referred to as the high seas, then the air space over such surface areas is not part of the territory of any nation and is free for the use of all. This basic doctrine of air space sovereignty was included in the Convention Relating to the Regulation of Aerial Navigation signed at Paris in 1919. Although the United States signed this convention, it did not ratify it. The United States did, however, adopt the same principle by the passage of the Air Commerce Act of 1926 and by the signature and ratification of the Pan American Convention on Commercial Aviation signed at Havana in 1928. Article 1 of the Havana convention is as follows:

> The high contracting parties recognize that every state has complete and exclusive sovereignty over the airspace above its territory and territorial waters.

The same principle was restated by the adoption of the Civil Aeronautics Act of 1938, which amended part of Section 6 of the Air Commerce Act of 1926 to read as follows:

> The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. [49 U. S. Code 176 (a)].

Again this principle was accepted by the United States in the signature and subsequent ratification of the Convention on International Civil Aviation signed at Chicago in 1944, which became effective on April 4, 1947. The relevant articles of the Chicago convention are as follows:

> Article 1: The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.
>
> Article 2: For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

International law thus recognizes

as part of the territory of each nation the air space over the lands, inland waters and territorial waters of such nation. These "territorial waters" are deemed to be synonymous with the "three-mile marginal ocean belt" referred to by the Supreme Court of the United States in *United States* v. *California*, 332 U. S. 19, to be discussed hereafter. But the rules of international law do not and cannot resolve the "internal sovereignty" problem as to whether the Federal Government and the governments of the several states have concurrent jurisdiction in the navigable air space over such states arising, for example, from the commerce clause of the Federal Constitution; or whether federal jurisdiction is exclusive in such navigable air space.

Crimes committed on board United States aircraft over foreign territory and over the high seas, over United States territorial waters, over the lands or internal waters of the several states of the Union, present three distinct legal problems which must be separately considered.

No U. S. Statute Punishes Crimes in Aircraft Flying Abroad

No legislation has ever been adopted by the Congress of the United States to provide for the punishment of crimes committed on board United States registered aircraft while in flight over foreign territory or over the high seas. The need for such legislation had been recognized in Great Britain in the early days of aviation. Section 14 of the Air Navigation Act, 1920, 10 & 11 Geo. V, c. 80, states:

> Any offence under this Act or under an Order in Council or regulations made thereunder, and any offence whatever committed on a British aircraft, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

The accepted effect of this section is to render any person subject to trial in Great Britain who has heretofore committed a crime on a British aircraft flying abroad whenever such person is found in Great Britain. This statute apparently accepts the thesis that for the purpose of the statute British aircraft may be deemed to be British territory.

Similar thesis has been accepted, apparently, in existing United States legislation as to crimes committed on board United States vessels. By Title 18, U. S. Code, Section 7 the "special maritime territorial jurisdiction of the United States" includes the high seas, other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, any vessel belonging to the United States or any citizen thereof or to any corporation created under the laws of the United States or any state, territory, district or possession "when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state". Within this special jurisdiction certain crimes such as murder, manslaughter, assault, etc., have been defined in the Code and are punishable in United States courts.

But these statutes have been properly held inapplicable to crimes committed on board a United States aircraft. In *United States* v. *Cordova*, 89 F. Supp. 298, decided March 17, 1950, the U. S. District Court for the Eastern District of New York held that an airplane was not a vessel and that federal statutes relating to crimes committed on board vessels on the high seas cannot be applied to crimes committed in aircraft flying above the high seas. No appeal was taken by the Government from this decision. In the opinion the district judge suggested that he had "little doubt that had it wished to do so Congress could, under its police power, have extended federal criminal jurisdiction to acts commited on board an airplane owned by an American national, even though such acts had no effect upon national security".

Decision Indicates Need for Federal Legislation

Perhaps the suggestion of the learned district judge is correct. If so, it is obvious that congressional legislation should be promptly adopted so that crimes committed on board United States registered aircraft when flying abroad can be tried and punished. But perhaps the problem is not quite so simple. By Article 1, Section 8 (10) of the United States Constitution the Congress was granted power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations". By Article 3, Section 2 (1) the judicial power was extended "to all cases of admiralty and maritime jurisdiction". Under these provisions, Congress has enacted the sections of the Code covering crimes on the high seas and on vessels of the United States within the admiralty and maritime jurisdiction. But it may be doubted whether the Constitution contains any specific grant of power to authorize federal criminal statutes and federal prosecution to cover crimes on board United States aircraft flying abroad when such crimes do not affect the national security. Perhaps such legislation might be sustained under Article 4, Section 3 (2) providing that the Congress "shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States". It is under this provision that statutes have been enacted to cover the prosecution of crimes in various territories of the United States. Perhaps the concept of "national territory" might be stretched to include United States registered aircraft flying abroad.

If this cannot be done, or if some other theory of United States police power cannot be found, then it may be necessary to rely on state legislation which will be cumbersome and difficult and confusing. Aircraft do not have a home port like vessels. They are registered nationally with the Federal Government. But perhaps the doctrine of state jurisdiction over its citizens abroad (such as discussed by Mr. Justice Holmes in *The Hamilton*, 207 U.S. 398) could be extended so that the law of the state of the registered owner of the

aircraft might be held applicable to crimes committed on board such aircraft even though outside the territorial limits of the state in question and not within the limits of the territory of any other state of the Union.

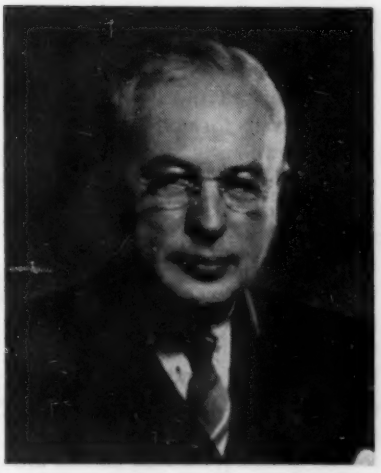
How About Crimes Committed Over Territorial Waters?

The territorial waters, or marginal sea, adjacent to the shores of the United States (at least within three miles of such shores) are part of the territory of the United States so far as its external sovereignty is concerned. The air space over such territorial waters is equally United States territory. If such air space is solely United States federal territory and not part of the territory of the adjacent state of the Union, then the Congress should, without delay, adopt legislation pursuant to Article 4, Section 3 (2) of the Constitution quoted above, and define crimes and provide for their punishment when committed in aircraft flying through the air space above these territorial waters.

Until recently it had been assumed that such legislation was unnecessary because it was felt that the territorial waters (at least within the three-mile limit) adjacent to any state of the Union were part of the territory of that state and that hence the air space over such territorial waters was likewise part of such territory in which the criminal laws of the adjacent state were in full force. But recent opinions of the Supreme Court of the United States have thrown the gravest doubts on the validity of these assumptions. Without going into the complexities of the decisions in the California, Louisiana and Texas submerged sea-lands cases, insofar as they affect title to the submerged lands and natural resources therein, it is necessary to note the implications contained in various statements of the Supreme Court regarding the legal status of the territorial waters themselves. In *United States* v. *California*, 332 U. S. 19, the Court held in substance that after the United States became a nation the three-mile belt along its shores was acquired by the National Government and that "we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it". This would appear to be tantamount to an opinion that the territorial waters adjacent to the United States became newly acquired federal territory after the United States became a nation and were never part of the territory of the separate states. If so, the air space over territorial waters is, and must be, exclusively federal territory and the definition of crimes committed in such air space and provisions for punishment of such crimes is a matter of exclusive federal jurisdiction.

Subsequent decisions have not denied this necessary implication in the *California* decision. It is true that in a case involving state regulation of the shrimp fishery, *Toomer* v. *Witsell*, 334 U. S. 385, decided in 1948, the year following the *California* case, the Court did hold that South Carolina had sufficient interests "within three miles of its coasts so that it may exercise its police power to protect and regulate that fishery". But in the same case the Court went out of its way to point out that while *United States* v. *California* did not "preclude all state regulation of activity in the marginal sea, the case does hold that neither the thirteen original colonies nor their successor States separately acquired 'ownership' of the three-mile belt". In *United States* v. *Louisiana*, 339 U. S. 699, decided June 5, 1950, the Court reaffirmed its decision in the *California* case stating:

> . . . California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U. S. pp. 31-34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.



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This again appears tantamount to a definite holding that the three-mile belt, and hence the air space above it, are part of the national territory and not part of the territory of the adjacent states. To the same effect is the opinion in *United States* v. *Texas*, 339 U. S. 707, decided the same day as the Louisiana case.

So grave is the question raised in these decisions as to the territorial status of the marginal sea and the air space above it, that it would appear incumbent upon the Congress to clarify the problem very quickly. If this air space is part of the national territory and not part of the adjacent state, there is no law in existence to cover the commission and punishment of crimes committed on board United States aircraft passing through such air space.

Is Air Space Over States Under Federal Jurisdiction?

Of far greater practical importance than the status of the narrow air space band over the marginal sea is the territorial status of the navigable

air space over the lands and internal waters of the several states of the Union. If such air space is part of the territory of the state below, as was generally assumed until comparatively recently, then the statutes of such state, criminal and otherwise, are applicable to aircraft flying through such air space, subject only to the constitutional rights of the Federal Government to regulate and protect interstate and foreign commerce passing through this air space. If, on the other hand, this navigable air space is not part of the territory of the state below and is exclusively federal territory, then no statutes are now in effect to define or punish crimes committed on board aircraft while within such air space.

These questions are necessarily raised by certain statements in the opinion of the Supreme Court in *United States* v. *Causby*, 328 U. S. 256 (1946). Causby, as owner of a dwelling and chicken farm near an airport outside of Greensboro, North Carolina, had recovered a judgment in the Court of Claims against the United States based on the theory that the United States had taken an easement over his property by continued low flights of military aircraft entering and leaving the airport. The status of applicable state and federal law at the time of the alleged taking of claimant's property and at the time of the decision of the Supreme Court of the United States was approximately as stated below.

The North Carolina General Statutes of 1943, Section 63 (originally Chapter 190 of the Laws of 1929) provided, among other things, as follows: "Sovereignty in space above the lands and waters of this state is declared to rest in the state, *except where granted to and assumed by the United States* [italics supplied]. Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land . . . is put by the owner . . . The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight" as stated above.

The statutes of the United States, as contained in Title 49, Chapter 9, U. S. Code, taken in part from the Air Commerce Act of 1926 and in part from the Civil Aeronautics Act of 1938, provided, among other things, as follows:

> Section 401 (3): "Air commerce" means . . . navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> Section 401 (24): "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter.
>
> Section 403: There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable airspace of the United States.
>
> Section 551 (a): The Board [Civil Aeronautics Board] is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time. . . .
>
> (7) air traffic rules governing the flight of, and for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight. . . .

The Supreme Court, in deciding the *Causby* case on *certiorari* from the Court of Claims, held in substance that the military flights complained of were below the minimum altitudes prescribed by the Board, that such flights were not within the navigable air space, and that there had been a taking of claimant's property. But in reaching these conclusions the Court treated the entire question of the legal status of the air space over the United States in such a manner as to imply that the navigable air space was federal territory which the Congress could dispose of and regulate. It is this phase of the decision in the *Causby* case (although possibly nothing more than dicta) which has raised the most serious question as to whether states below have authority to regulate flight (even intrastate) in the navigable air space or to prescribe by statute for the definition and punishment of crime committed on board aircraft in such navigable air space. In denying rights of private property in the navigable air space, the Court held that "the air is a public highway, as Congress has declared", and "to recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim". In discussing the low flights which were found to have resulted in a taking of claimant's property, the Court said: "Hence, the flights in question were not within the navigable airspace *which Congress placed within the public domain*" (italics supplied).

While thus holding that "the airspace is a public highway", the Court found that the landowner "owns as much of the space above the ground as he can occupy or use in connection with the land". In substance the Court appears to have divided the air space into two zones. In the lower zone, below minimum altitudes of flight as fixed pursuant to federal statutes, the landowner has certain private rights. In the upper zone, consisting of the navigable air space, private property cannot exist and this zone is deemed to have been created as a public highway by Congress and placed within the "public domain". The only reference to the North Carolina statute in the opinion of the Court concludes with the finding that "our holding that there was an invasion of respondent's property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the super-adjacent airspace". Nowhere does the Court indicate how or in what manner the state of North Carolina had granted its claimed sovereignty over the navigable air space to the United States in such manner that the Congress could place such navigable airspace in the public domain, nor does the

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Citizenship:

"The Real Profession of Every American"

by Harold M. Stephens • Chief Judge of the U. S. Court of Appeals for the District of Columbia Circuit

■ Two great historical documents, the Declaration of Independence and the Constitution, draw a firm line of division in governmental theory between free government and tyranny. Judge Stephens writes of the principles behind those documents, declaring that, while the political truths there expressed cannot fail the people as a way of civic life, the people may fail the Declaration and the Constitution. How can we have rule by the people, he asks, if the people do not take the trouble to learn about their government? He declares that we have the leadership and the strength and the courage to resist a threat to our Government from without, but that indifference and want of civic knowledge on the part of our own people may endanger us from within. In this article, taken from an address delivered before the Grand Jurors' Association in Baltimore last fall, Judge Stephens reminds his countrymen that, in a democracy, the citizens must regard citizenship as their true profession.

■ In 1925 at Annapolis President Coolidge addressed the graduates of the Naval Academy. He emphasized to them not only their duty as officers but also their duty as citizens. He said:

> But while you will serve the Nation in this special field of endeavor, you will not forget that the real profession of every American is citizenship. Under our institutions each individual is born to sovereignty. Whatever he may adopt as a means of livelihood, his real business is serving his country. He can not hold himself above his fellow men. The greatest place of command is really the place of obedience, and the greatest place of honor is really the place of service. It is your duty in the part you propose to take to make the largest contribution you can to the general citizenship of your country.

The essential purpose of government among a free people is the securing of freedom and the preservation of order. The problem is the reconciliation of these two needs. As put by Mr. Justice Sutherland, order must not be sacrificed in the name of liberty for that would be anarchy; liberty must not be lost in the name of order for that would be despotism. Steps toward a due reconciliation of these two needs of liberty and order had been taken in Magna Charta and in the enactment into statute of the Declaration of Right presented to the Prince and Princess of Orange, later William and Mary, by the English Lords and Commons, by which free elections were assured, excessive bails and fines forbidden and cruel and unusual punishments prohibited. But the framers of our Declaration of Independence and our Constitution devised and put into operation the most effective free government in recorded history. Through their experience in government and their acquaintance with history they had discerned with extraordinary clarity of vision those postulates, principles, rights, standards, guarantees and patterns of governmental conduct which are conducive to the attainment of the greatest degree of freedom for the individual consistent with the good of all and with the preservation of order. In essence they constitute a simple and easily understood political creed: Men are created politically equal and are endowed by their Creator with unalienable rights, including life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. The sense of duty and conscience of the citizen, not force, are to energize civic conduct—force is to be used only for protection against external attack and to preserve internal order. In a federation of states there must be only such limitation of local governmental power as is essential to effective central authority. Government for a large number of people inhabiting a large area must be representative, not direct. There are legislative, executive, and judicial functions in government and these must be separated, not combined, and must be independent except for checks and balances. The inherent rights of man, including freedom of religion and speech, and the right to

labor and to possess the fruits of labor, must be guaranteed against governmental interference. The people are to be protected against unreasonable searches and seizures. No person shall be held for a capital or infamous crime except by indictment by a grand jury, nor be twice put in jeopardy for the same offense, nor be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. There shall be jury trial, speedy and public, information for an accused of the nature of the charge against him, the right to be confronted by the witnesses against him, the right to compulsory process for obtaining witnesses in his favor, and the right to the assistance of counsel. The judicial power is to be lodged in independent courts to decide according to law cases and controversies between persons and between persons and the Government. Both persons and the Government are to be beneath the law.

Our Government Has Achieved Freedom and Order

Under our Constitution and the connected party system through which governmental policies are determined by the people, and representatives and officers are selected, the greatest degree of individual freedom and the best preservation of order that history has recorded have been attained. Under this system, through the exertion of individual effort in free enterprise, natural resources have been turned into wealth and an unparalleled standard of living has been reached. The federal principle binding our states into one union has counteracted the quarrelsomeness of mankind and has largely abolished the jealousies of trade. Church and state have been separated, but religious institutions have nevertheless thrived and abounded, protected and encouraged—in order that the Christian concept of man which is the foundation of free institutions should be perpetuated—but not supported by the state.

Under our constitutional system sound decisions on questions of international and national policy have in the large been reached. In a long view the medium for the exchange of goods and services has been made sufficient, taxes have been just and due protection of national resources has been effected in the public interest. Justice has been administered by courts and juries (grand and petit) whose independence and integrity have rarely indeed been called into question. Schools, colleges and universities have developed to an extent without parallel, with resultant expansion of the boundaries of knowledge as a potential foundation for intelligent action on the part of the citizen, both private and public. So great has been the economic, educational and political opportunity offered under our system of government that the world has flocked to our shores.

In view of its objective of accomplishing freedom and order according to the will of the people, our constitutional system has, in a large view, been efficient. True, it takes longer to formulate a policy, to pass a statute or to amend a constitution than to utter an edict. There is a cumbersomeness about the representative process not characteristic of despotism, but this is the necessary price of the diffusion of power among the people rather than the concentration of power in a few or in one.

To alter or impair in any essential part our constitutional system, or to trade it off for anything else that is now offered, or not to defend it at whatever cost of blood and treasure against external attack, or not to preserve it against internal attrition would be political folly, contrary to the nature of man. For it is the nature of man to be free, and tyranny, whether of kings or of communists, is a condition of political morbidity.

Declaration, Constitution Define Line Between Tyranny and Freedom

The fundament of our form of government is the recognition, as self-evident truths, that ". . . all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men, *deriving their just powers from the consent of the governed. . . .*" These statements in the Declaration of Independence, together with the words of the Preamble to the Constitution, *"We, the people of the United States,* in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, *do ordain and establish this Constitution for the United States of America,"* [Emphasis supplied] constitute the prime line of division in governmental theory between free government and the several forms of tyranny and totalitarianism under which the state is held to be supreme and the people but its creatures.

It must be recognized, however, that these political truths, like the truths of the Gospels, are but words upon parchment unless they are lived by the people. The teachings of the Gospels have never failed and cannot fail humankind as a way of individual life; but the people can fail those teachings; they often have. The teachings of the Declaration of Independence and the Constitution cannot fail the people as a way of civic life; but the people can fail those teachings, and thereby lose their freedom. In the virtue of constitutional recognition of sovereignty in the people lies therefore an inherent danger. For with sovereignty in the people the maintenance of our governmental structure and the efficiency of its functioning for the securing of freedom and the preservation of order is dependent upon active and intelligent participation on the part of the whole people in governmental affairs. Absent that, sound decisions on questions of national policy will not be made; competent officers and representatives will not be selected and held to account. The very heart of our system is in wise exercise of their sovereign power by the people. If that heart beats feebly, the body politic is

threatened not only in the effectiveness of its functioning, but in its very survival.

Even in Critical Times We Have Leadership, Strength, Courage

These are critical times. For the first time since 1812 we are faced with the possibility of invasion of our borders by an external enemy, in the air. For leadership in protection against this danger we must rely upon the military; for strength, upon our natural resources and our industries; for courage, upon our youth. None of these will be lacking —of this we can be assured.

Can we be equally certain that indifference and want of civic knowledge on the part of the people in whom sovereignty rests will not menace our free government from within? The sovereign power of the citizen can be made ineffective by lack of interest in governmental affairs, by lack of informed and considered judgment, by overconfidence in representatives and officers—taking good government for granted—by cynical lack of faith in the officers and functions which deserve the people's trust, by inattention to civic duty. The government must not be looked upon, as many seem to look upon it, as a thing apart, as an entity in itself, upon which we may fawn for favor or lean for security or at which we may carp and rail. The government has no strength except as the people give it strength. It has no money except as the people give it money. It can furnish no security except as the people make it secure. It is not a thing apart, it is you and I, in whom sovereignty, as citizens of the United States rests, acting through our representatives and officers and agents.

In the Presidential election of 1948, only 52 per cent of the people eligible to vote exercised their franchise. This indifference was a long step toward oligarchy—government by the few. If it be said that in that election the policies of the two major parties as declared in their platforms were insufficiently diverse to make a choice worthwhile, it is to be answered that it lay within the power of the people through their party organizations to bring about a differentiation.

If it be said that the two major parties did not reflect the real cleavage of opinion in the country as between conservative and liberal viewpoints, it is again to be answered that by effective and courageous exertion of their sovereign power the people could have caused to be created, if they had willed to do so, different or even new party organizations. That this can happen is evidenced by the fact that it has happened. There have been many parties in our history and they have arisen in response to changed public opinion, and have for the same reason fallen.

Knowledge of Constitution Essential to Civic Action

Ignorance of the structure and functions of our constitutional system makes intelligent civic action impossible. Many years ago when as a trial judge in Utah I was hearing a naturalization docket, an applicant who had come to the United States as a convert to the Mormon Church was taking his open court examination upon his knowledge of the history and principles of the government. To the questions put by the naturalization examiner, he was able to give no answers at all. Thinking him to be frightened because he was in court, I told him to be at ease and asked him questions which I thought might refresh his recollection. First I said, "What is the Fourth of July?" He replied promptly, "That was the day when the Pioneers came into the valley." I said, "No, you are thinking of the twenty-fourth of July which is celebrated by the Mormon people because of that event." "Who", I asked him next, "first settled upon the shores of this continent?" Brightening again he answered, "That was the Nephites." "No", I replied, "the Nephites, according to the Mormon historical theory, were one of the Lost Tribes of Israel—supposed, with the Lamanites (allegedly progenitors of the American Indian) to have been early inhabitants of this country. You have been well schooled", I said, "in the religious history of your faith, but my questions relate to profane history." Again I questioned him—"Have you ever heard of Theodore Roosevelt?" He answered "No." "Have you ever heard of Abraham Lincoln and the war between the states?" Again he answered "No." "Have you ever heard of the Revolutionary War?" At this the applicant leaned toward me and in deprecatory manner said, "Yes, judge, I did hear of it, but I was a very young man at the time and I did not pay much attention to it." This applicant was not admitted.

In the years that have passed since this episode, the instruction of naturalization applicants in the history and principles of our government has greatly improved so that those who now apply for citizenship often demonstrate a knowledge of our institutions superior to that of some college graduates. Recently, a retired shoe manufacturer who had attended both Harvard and the Massachusetts Institute of Technology, asked me,

Harris & Ewing

Harold M. Stephens was born in Nebraska in 1886. He received his A.B. from Cornell in 1909 and his LL.B. from Harvard in 1913. Admitted to the Utah Bar in 1912, he began practice in Salt Lake City. He was appointed assistant attorney general in the Department of Justice in 1933, and to the United States Court of Appeals in 1935.

shortly after I had been introduced to him as a federal judge, what a federal judge is and what the functions of the federal courts are.

How Many People Understand Independence of Courts?

How many citizens are adequately informed concerning the constitutional independence of the courts and their duty to administer justice according to law and without respect to persons or public clamor? Recently, a federal court was attacked by both citizens and a public officer for a performance of that duty. How far are our citizens aware of the constitutional problems arising from the United Nations Charter, and the Genocide Convention and the Covenant on Human Rights if made the subject of treaty, in view of Article VI of the Constitution providing that treaties shall be the supreme law of the land and that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding? Recently, a California court has held that the provisions of the United Nations Charter as a treaty nullify a California statute and judicial decisions with respect to the disability of aliens to own land. How far are our sovereign citizens aware of the implications of such a decision in respect, for example, of the freedom of the nationals of Russia or Communist China to buy strategic property upon the Pacific Coast, or in respect of the possibility of the nullification of the right to self-government, both local and national, by the action of a President and two-thirds of the members of a Senate present at the time of approval of a treaty? If our sovereign citizens are not informed upon such subjects, how can they intelligently participate in the determination of pertinent national policies? How does it occur that many of those who have submitted to Communist influences are the possessors of degrees from American colleges? Does our popular education, supposedly the source of the literacy necessary to the intelligent exercise of their duties by sovereign people, fail to inform them effectively concerning the structure and function of their government? Under the elective system in our schools and colleges, thousands of students graduate without having pursued courses in either history or government. How shall we continue to operate and to preserve the engine of freedom if the driver is unacquainted with its parts and functions, and if he will not perform his duty in the cab?

Bar Has Duty of Perpetuating Our Governmental Institutions

We properly look to the Bar of this country as the one body of citizens fully informed by both training and experience concerning the structure and functions of our constitutional government. The obligation of the Bar in respect of the effective operation and perpetuation of our institutions is accordingly a very high one.

It is the duty of members of the Bar to participate in the affairs of government, to recognize and act upon their sovereign power, to inform themselves upon public questions, great and small, to form and express considered opinions, to participate in party affairs, to aid in the writing of party platforms and in the selection of proper candidates for office, local and national, to register and to vote, and finally, always to respect the institutions of the Government and to obey the Constitution and laws. The Bar has a further duty to lead the citizen to do likewise.

Great questions confront us. To mention but a few: Shall we or shall we not join in the formation of an international government with consequent diminution of our own sovereignty, in the hope of world peace; shall we or shall we not, by enlarging national authority and diminishing local, modify the balance of power effected in the Constitution as between the states and federal union; shall government controls of economic activity be maintained, increased or diminished; shall we look to the Government for health and security, or shall we not? I do not assume to suggest how these questions should be answered. I emphasize only that they are for the people to decide and that they must make their decisions with the aid and under the leadership of the Bar.

The necessity for effort and sacrifice on the part of the people if freedom is to be gained and to prevail has been poetically expressed in Olive Schreiner's "Three Dreams in a Desert":

> I saw a desert and I saw a woman coming out of it.
>
> And she came to the bank of a dark river; and the bank was steep and high.
>
> And on it an old man met her, who had a long white beard; and a stick that curled was in his hand, and on it was written Reason. And he asked her what she wanted; and she said, "I am woman; and I am seeking for the land of Freedom."
>
> And he said, "It is before you."
>
> And she said, "I see nothing before me but a dark flowing river and a bank steep and high, and cuttings here and there with heavy sand in them."
>
> And he said, "And beyond that?"
>
> She said, "I see nothing, but sometimes, when I shade my eyes with my hand, I think I see on the further bank trees and hills, and the sun shining on them!"
>
> He said, "That is the Land of Freedom."
>
> She said, "How am I to get there?"
>
> He said, "There is one way, and only one. Down the banks of Labor, through the water of Suffering. There is no other."
>
> She said, "Is there no bridge?"
>
> He answered, "None."
>
> She said, "Is the water deep?"
>
> He said, "Deep."
>
> She said, "Is the floor worn?"
>
> He said, "It is. Your foot may slip at any time, and you may be lost."
>
> She said, "Have any crossed already?"
>
> He said, "Some have tried."
>
> She said, "Is there a track to show where the best fording is?"
>
> He said, "It has to be made."
>
> She shaded her eyes with her hand; and she said, "I will go."
>
> And she stood far off on the bank of the river. And she said, "For what do I go to this far land which no one has ever reached? Oh, I am alone! I am utterly alone!"
>
> And Reason said to her, "Silence! What do you hear?"
>
> And she listened intently, and she said, "I hear a sound of feet, a thou-

sand times ten thousand and thousands of thousands, and they beat this way!"

He said, "They are the feet of those that shall follow you. Lead on, make a track to the water's edge! Where you stand now, the ground will be beaten flat by ten thousand times ten thousand feet!" And he said, "Have you ever seen the locusts how they cross a stream? First one comes to the wateredge, and it is swept away, and then another comes and then another, and then another, and at last with their bodies piled up a bridge is built and the rest pass over."

She said, "And of those that come first, some are swept away, and are heard of no more; their bodies do not even build the bridge."

"And are swept away, and are heard of no more—and what of that?" he said.

"And what of that—" she said. "They make a track to the water's edge."

"They make a track to the water's edge—!" And she said,

"Over that bridge which shall be built with our bodies, who will pass?"

He said, "The entire human race."

And the woman grasped her staff.

And I saw her turn down that dark path to the river.

Southeastern Regional Convention Held in Atlanta, Georgia, March 7-10

■ Living up in every way to its advance publicity, the Southeastern Regional Convention of the American Bar Association, held in Atlanta, March 7, 8, 9, 10, under the leadership of E. Smythe Gambrell of Atlanta, as General Chairman, and the cooperation of the members of the various supporting committees from the seven southeastern states, was a red-letter event for the legal profession. It brought together under one roof in a hospitable southern city approximately 700 paid registrants—a homogenous group of lawyers drawn from the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, and Tennessee—and gave them in three days a full and well balanced program of inspirational addresses, workshop lectures, round-table discussions, social diversions, and the warm and informal fellowship one might expect in such a setting. It brought the American Bar Association for the first time to hundreds of lawyers under happy and auspicious circumstances. In keeping with the customs of the area, the ladies were in evidence and contributed much to the success of the Convention.

The arrangements had been worked out over a period of months, and the various Committees, aggregating more than 100 leading lawyers from seven states, functioned with smoothness and precision. The fact that the seven state bar organizations took a formal and active part in the planning and in extending the invitations added to the representative character and the success of the meeting.

President Fowler and other officers and members of the Board of Governors of the Association gave the meeting their full support and many of them participated in its sessions. Many noted national figures addressed the two Assembly sessions on "Public Relations" and "World Problems."

The workshop courses were under the leadership of expert lecturers well known in their fields, and in down-to-earth fashion they gave to the lawyers much worth-while practical advice to aid them in dealing with their everyday professional problems. Ten Sections of the Association had well organized programs of the highest character, many of them being as well attended as the Section meetings at Annual Meetings of the Association. The breakfast meeting of the American Judicature Society was a successful and well attended event.

True southern hospitality reigned in abundance and included the Atlanta Bar Association's stag smoker as the opening event on Wednesday evening, the ladies' luncheon and fashion show at Piedmont Driving Club on Thursday, the cocktail party for the lawyers and their ladies at the Lawyers' Club Quarters on Thursday evening, and the ladies' tour of points of interest and the tea on Friday, as well as informal entertainment in the homes of Atlanta lawyers.

In character and spirit, this regional meeting was the equal of any Annual Meeting, and it had the advantage of being closely and intimately organized among lawyers of common interests and traditions. It has been demonstrated that these regional meetings will serve to stimulate interest in bar activities and bring the Association itself nearer to its members.

The sweep of this gathering, and its impact in the area, is indicated by the fact that all the courts in greater Atlanta adjourned in order that lawyers and judges might attend. Many judges who had not had previous contact with the Association were in attendance, participating in its seminars and round-table discussions. Many lawyers and judges who were not even members of the Association were enjoying its sessions and making their contributions to its success.

This Convention is a milestone in the progress of bar organization activities in this country and may be regarded as a tribute to the faith and determined efforts of the Association's Committee on Regional Conventions, under the leadership of Chairman Burt J. Thompson. It has shown that there is a need for meetings of this kind and that the lawyers of the country will give them their support when offered an outstanding program of real interest. It will serve as a model for future gatherings in other parts of our country, in bringing the advantages of the American Bar Association to the rank and file of lawyers on their own home grounds.

(Continued on page 298)

Nominations for Officers and Governors

Made by State Delegates at Mid-Year Meeting

■ The State Delegates nominated candidates for President, Secretary, Treasurer and four posts on the Board of Governors at the Mid-Year Meeting in Chicago on February 27. The nominations were made in accordance with Article VIII, Section 2 of the Constitution of the Association, and the nominees will be voted upon by the House of Delegates at the next Annual Meeting in New York, New York.

The following were nominated:

President, Howard L. Barkdull, of Cleveland, Ohio

Secretary, Joseph D. Stecher, of Toledo, Ohio

Treasurer, Harold H. Bredell, of Indianapolis, Indiana

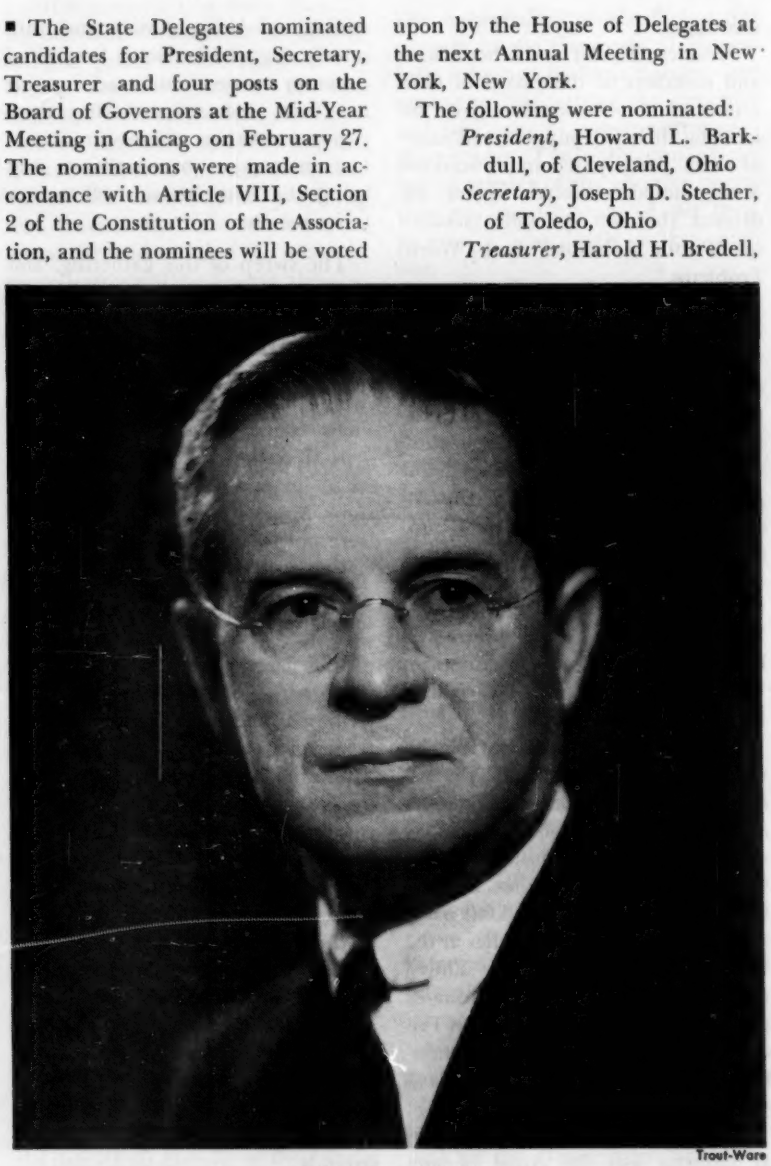
Members of the Board of Governors:

First Circuit—Allan H. W. Higgins, of Massachusetts

Second Circuit—Cyril Coleman, of Connecticut

Sixth Circuit—Donald A. Finkbeiner, of Ohio

Tenth Circuit—Ross L. Malone, Jr., of New Mexico



Trout-Ware

HOWARD L. BARKDULL

Mr. Barkdull is a native Ohioan, born September 3, 1887, at Norwalk. He was educated at Central High School in Toledo, received the degree of A.B. from the University of Michigan in 1909 and a J.D. degree from the same school in 1911. The University awarded him the honorary degree of LL.M. in 1940. He began the practice of law in Cleveland in 1911, and a year later became office attorney and assistant secretary of the National Carbon Company, Inc.

He served in the Army in World War I and was in Officers Training School at the time of the Armistice; he was later commissioned a second lieutenant in the Officers Reserve Corps. In 1919 he entered the firm of Squire, Sanders and Dempsey and became a member of the firm in 1927.

Mr. Barkdull has been active in bar association work for many years. From 1932 to 1935, he was a member of the Executive Committee of the Cleveland Bar Association and he has served on various committees of that organization over a period of years.

His service in the Ohio State Bar

Association includes chairmanship of the Committee on Revision of the Ohio Probate Code, which was enacted in 1931; membership on the Executive Committee, representing the Cleveland district, from 1934 to 1938; and service as President of that association in 1938-1939.

His many activities in our Association have made him well known to our members. He represented the Ohio State Bar Association in the House of Delegates from 1938-1942, was Chairman of the Committee on Ways and Means in 1940-1942, was State Delegate from Ohio from 1942-1949, Chairman of the Committee on Rules and Calendar, 1943-1946, member of the Board of Governors, 1944-1948, and Chairman of the House of Delegates, 1946-1948. He is presently a member of the Board of Directors and Secretary of the American Bar Association Endowment (since 1942), member of the Council of the Survey of the Legal Profession (since 1947), member of the Committee on Scope and Correlation of Work (since 1948) and a member of the Commission on Organized Crime in Interstate Commerce (since 1950).

He is President of the National Conference of Commissioners on Uniform State Laws, and has been active in that organization since 1940, serving from 1940 to the present as one of three Commissioners from Ohio. He was Vice President in 1943-1946, and Chairman of the Executive Committee in 1947-1949.

He has been a member of the Board of Directors of the American Judicature Society since 1939, its Vice President since 1942, and a member of its Executive Committee since 1943.

Mr. Barkdull also finds time for many activities other than legal; he is past president of the University of Michigan Union and a member of the Order of the Coif, Phi Beta Kappa, Phi Delta Phi and of the Union Club.

He has been a member of the vestry of the Episcopal Church of the Ascension in Lakewood, Ohio, for the last three years, and is now junior warden. He is a member of the Board of Trustees of the Church Home and was Secretary of that board from 1946 to 1950.

Mr. Barkdull married Eloise Standart Kelsey, of Toledo, in 1917, and they have two children, Margery Kelsey Barkdull, now with the American Embassy at Madrid, Spain, and Howard L. Barkdull, Jr., a resident of Lakewood, Ohio. There is one grandchild, Joan Kelsey Barkdull.

Sketches and photographs of the nominees for members of the Board of Governors will appear in the May issue of the JOURNAL.

Inarticulate Major Premises

■ "I easily grant that there are great numbers of opinions which, by men of different countries, educations, and tempers, are received and embraced as first and unquestionable principles; many whereof, both for their absurdity as well as oppositions to one another, it is impossible should be true. But yet all those propositions, how remote soever from reason, are so sacred somewhere or other, that men even of good understanding in other matters will sooner part with their lives, and whatever is dearest to them, than suffer themselves to doubt, or others to question, the truth of them. . . . When men so instructed are grown up, and reflect on their own minds, they cannot find anything more ancient there than those opinions which were taught them before their memory began to keep a register of their actions; and therefore they make no scruple to conclude, that those propositions of whose knowledge they can find in themselves no original, were certainly the impress of God and nature upon their minds, and not taught them by any one else."

—Locke, *An Essay Concerning Human Understanding*, Book I, Chapter III, Paragraphs 21 and 23.

Membership: A Panacea

AT EVERY annual and mid-year meeting the House of Delegates and Board of Governors hear from Section and Committee chairmen as to past accomplishments and future plans and hopes in the many and varied fields of professional activities which are the concern of the American Bar Association. These reports inevitably spell out two ever-pressing needs: *more man power; more money.* With only 43,000 ABA lawyers supporting the cause of national bar organization among 190,000 lawyers; with only about 1200 of those giving of their time in active committee and section work, it is obvious that the remedy is — MEMBERSHIP AND MORE MEMBERSHIP.

Have you read pages 43 and 44 of the January Journal; page 127 of the February Journal; page 210 of the March Journal? Did you heed those messages? HAVE YOU DONE YOUR PART AND PRODUCED AT LEAST ONE NEW MEMBER?

The annual dues notices that are to go out shortly will contain an application blank. Please use it for that qualified lawyer-friend or associate whom you are willing personally to sponsor and endorse.

A further supply of application forms may be obtained by addressing Membership Department, American Bar Association Headquarters, 1140 North Dearborn Street, Chicago 10, Illinois.

STANDING COMMITTEE ON MEMBERSHIP
James R. Morford, *Chairman*
Albert E. Jenner, Jr.
A. M. Mull, Jr.

Dean Pound and Bar Association Beginnings:

A Survey Request for Primary Data

by **Charles O. Porter** • of the Oregon Bar

■ The legal profession is found in every civilized country. The profession has always been organized in bar associations — except in the United States where the history is chequered and is still partly unknown.

The Survey of the Legal Profession has made some surprising discoveries which are related in this article.

■ Roscoe Pound, juristic Nestor and Dean Emeritus of the Harvard Law School, is writing a report for the Survey of the Legal Profession on "The Development of Bar Associations". No one could write with more authority or with more concern.

Under what circumstances did the lawyers in our early days organize bar associations? What did the associations do? Why did they thrive or peter out? The answer to questions like these require the mettle of a Roscoe Pound.

But with all his vast knowledge, Dean Pound admits that the basic data about the origins of early bar associations have never been sufficiently assembled.

Very little is in print. There is an appendix in *Materials and Methods of Legal Research* (Lawyers' Co-op, 1933) by Frederick C. Hicks. And ten years later Dean Pound's article, "The Legal Profession in America", appeared in the June, 1944, *Notre Dame Lawyer*. If there are other compilations of original materials, they have so far eluded us.

A little story illustrates how our need for more original data was demonstrated. The Director of the Survey, Reginald Heber Smith, had reason to regard The Association of the Bar of the City of New York, founded in 1870, as the oldest of the existing lawyer groups. William D. Guthrie had called it "the premier association of its kind in every sense of the term".[1] Philip J. Wickser wrote that the Association of the Bar was "the model for all others".[2] In 1950, James Willard Hurst, in his valuable book, *The Growth of American Law*,[3] stated: "Planned bar organization revived first in the great cities." And then he referred to the rise of The Association of the Bar in 1870.

On this evidence you might grant that we would be justified in dating modern bar associations from 1870—the year The Association of the Bar of the City of New York sprang fully armed to challenge the corrupt Tweed judiciary.

However, on a visit to Columbus, Ohio, Mr. Smith happened to be looking at the early records of the Columbus Bar Association. What was the date of its founding? April 20, 1869! That was a distinct shock. It proved that even the most authoritative literature on the subject would have to be re-examined.

So in the spring of 1950 we sent a simple questionnaire to the 1200-odd state and local bar associations in the United States. Less than 12 per cent replied. The questionnaire asked:

1. Name?
2. Date of original formation?
3. Continuous since formation?
4. Chief promoters, their ages, and reasons for starting bar association.

Table I compiles the answers of the local associations as to year of origin. Table II presents the same information for the state associations. *Seven* local associations claim that they antedate The Association of the Bar of the City of New York as continuous groups.

Wickser also wrote that the first county association started in 1870.[4] These men are careful, responsible scholars. It gives us no joy to contradict Wickser, Hurst and Guthrie; we don't, we can't blame them. Their statements were verifiable by the data available in print. But those data were incomplete and in part erroneous.

1. Address before the Chicago Bar Association, 1926, 28 Assn. Rep. 8.
2. 15 Cornell Law Q. 390, 396 (1930).
3. Page 286, Little, Brown and Company, Boston, 1950.
4. Page 400, op. cit.

TABLE I

The Local Associations

Before 1860	5
Philadelphia, 1802	
Cumberland County (Maine), 1829	
Detroit, 1835	
Wilkes-Barre, 1850	
Milwaukee, 1858	
1863 (During the Civil War)	1
Scott County (Iowa)	
1864-1875	7
Columbus (Ohio), 1869	
The Association of the Bar of the City of New York, 1870	
Cincinnati, 1872	
San Francisco, 1872	
Cleveland, 1873	
Chicago, 1874	
Holmes County (Miss.), 1875	
1876-1879	4
1880-1899	26
1900-1919	32
After 1919	21
Total	96

Survey's Findings Are Only a Beginning

Nor is our purpose to boast about our findings; indeed, what we have is only a bare beginning and most of it needs to be checked and qualified.

Several of the state associations were in operation for short periods prior to the beginnings of their present organizations.[5]

Before the Civil War, Mississippi (1825), Arkansas (1837), Louisiana (1847) and Massachusetts (1849) either had bona fide professional organizations or movements in that direction.

After the Civil War and before 1900, lawyers in at least seven states failed at least once in attempts to organize.

In a letter to the Survey about our "origins" research, Dean Pound warns:

> In my experience the answers will have to be scrutinized a bit closely as probably every bar association will endeavor to make out a pedigree relating back to the earlier associations which became dormant and remained dormant a long time.

Dean Pound knows about bar associations as a promoter as well as a scholar: He revived the Nebraska Bar Association in 1900 as chief promoter and first Secretary.

The purpose of this article is to ask you readers of the JOURNAL for additional data about the origins of our bar associations. So that you will understand the kind of data we want and where they are taking us, let me tell you something about the returns we have received so far.

Bar Association Promoters Have Been Men of All Ages

Simeon Baldwin, the prime mover in the founding of the American Bar Association in 1878, was but 38 years old at the time. The answers to our questionnaire showed that men of all ages took the lead, some in their twenties, others in their sixties; frequently all ages were represented.

Colonel Cooper was 32 when he led the drive for the Chicago Bar Association. One of the chief promotors of the Texas Bar Association (1882) was O. M. Roberts, 67 at the time; he had served twenty-one years on the Texas Supreme Court. But his counterpart for Virginia's Charlottesville and Albemarle Bar Association (1916) was George Gilmer, 28.

Charles Strauss, who founded the New York County Lawyers Association in 1908, was neither old nor young; he was 54 years old.

Survey Is Interested in Aims and Activities

Below are a few examples of the kind of information the questionnaires elicited.

1802: *Philadelphia Bar Association.* Started as "The Law Library Company". Not clear when it began to function as a true bar association.

1825: *Bar Association of Mississippi.* Sent memorial to 18th Congress asking extension of Circuit Courts to new states and representation on United States Supreme Court. "J. E. Davis" was President.

1829: *Cumberland (Maine) Bar Association.* Fifty members in 1829, in which year a pamphlet relating to ethical questions and containing a complete fee schedule was published.

1835: *Detroit Bar Association.* Their early records show active grievance committee; but no evidence that the association continued past the 1840's.

1837: *Bar Association of the State of Arkansas.* A sort of gentlemen's club. One dissenting vote could keep an applicant out. Six was a quorum at a semi-annual meeting. Barratry, soliciting, etc., or acting "in any of the relations of life in a manner unbecoming a gentleman" was forbidden. First offense, public reprimand; second, expulsion, if two thirds of the members concurred; then an automatic recommendation for disbarment. Expelled member was to be ostracized *completely*. Full set of minimum fees, to which every member pledged adherence; "the lowest we can reasonably and honorably receive"—*e.g.* oral advice, $5.00; written advice, $10.00; wills, $20.00. Dues were $10.00 annually.

1849: *Massachusetts Bar Association.* Elaborate plans for organization. Lawyers from all over the state came to organization meeting; Charles G. Loring was chairman of

5. Where available, our origins data are derived directly from the association concerned; where no reply was received, we use the sources cited in the fourth paragraph of this article.

twenty-man committee. Promoters were "actuated by a sense of dignity and honor that should pertain to a profession established for the administration of justice". All is silence as to aftermath.

1850: *Wilkes-Barre Law and Library Association.* Like Philadelphia, apparently this group was mainly a law library until near the end of the century.

1858: *Milwaukee Bar Association.* Started by one hundred lawyers; first president, Judge Arthur MacArthur whose grandson, Douglas, did not become a lawyer.

1875: *State Bar Association of Connecticut.* In 1874 eight leading members of the Hartford Bar wrote each lawyer in Connecticut and asked him to attend an organization meeting of a state bar association.

1877: *Illinois State Bar Association.* Founded to improve court systems. Had "Committee on Foreign Association" to report at first annual meeting on bar organizations in other states.

1878: *Wisconsin Bar Association.* Honorable Edward G. Ryan, Chief Justice of Supreme Court and Chairman of the Organization Committee, said in his opening speech:

> The Bar as a body can only have the influence which properly belongs to it on professional subjects through an organization by which it can speak with one voice.

1882: *State Bar of Texas.* Great stress at outset on improving administration of justice.

1889: *Brooklyn Bar Association.* Founded after local newspaper printed story showing up incredible lassitude of a current bar organization (formed in 1872) with respect to an erring attorney.

1906: *Multnomah (Oregon) Bar Association.* Not formed to cure "evils" but to "encourage general good will with the profession". (Of the original 157 members, 42 survive.)

1908: *Texas County (Oklahoma) Bar Association.* Founded "to set fees to be charged so all could make a living, and to stop cut-throat competition".

1908: *New York County Lawyers Association.* Anyone admitted to the New York Bar was eligible for admission; this was a radical departure from the practice of The Association of the Bar of the City of New York.

1915: *Clay County (Missouri) Bar Association.* One of the surviving founders states that "the early purpose of the Bar Association was to have a good time and later to see if they couldn't get the fees charged on a little higher basis".

TABLE II

The State Associations

1874	District of Columbia	1890's		Michigan
1875	Connecticut and Iowa			Oklahoma
Later in 1870's	New York			Oregon
	Illinois			Maine
	Alabama			Arizona
	Wisconsin			Utah
	Vermont			Pennsylvania
	Indiana			Maryland
	Louisiana			Colorado
1880's	Missouri			South Dakota
	Ohio			Rhode Island
	Tennessee			North Dakota
	Arkansas			New Jersey
	Texas	1900's		Nebraska
	Kentucky			Mississippi
	Georgia			California
	Minnesota			Idaho
	South Carolina			Massachusetts
	Montana	1910's		Nevada
	Kansas			Wyoming
	New Mexico	1923		Delaware
	West Virginia			
	Florida			
	Virginia			
	Washington			
	New Hampshire			
	North Carolina			

Summary:		(Subtotals)	Out of how many states?
1870's	9	9	39 (Before 1879)
1880's	18	27	43 (Before 1889)
1890's	13	40	45 (Before 1899)
1900's	5	45	46 (Before 1909)
1910's	2	47	48 (By 1912)
1923	1	48	48

1922: *Lawyers Club of Atlanta, Inc.* Founded by younger lawyers who criticized the "inactivity of the Atlanta Bar Association and certain unethical practices by many members of the bar".

1946: *Marshfield (Wisconsin) Bar Association.* Started by R. E. Emery, 35, for "better relations among attorneys; agreement on minimum fees".

Tables Show Scantiness of Data

Our data are scant and in part unrepresentative. How incomplete is the present information may be better understood by comparing the number of our returns as shown on Table I with the number of bar associations estimated to exist in the latter part of the period under discussion:[6]

1890.....159 bar associations in 36 jurisdictions.

1916.....623 bar associations in 41 jurisdictions.

1930.....more than 1100 bar associations.

If we can persuade the Bar to volunteer the information we need, Dean Pound's report will be able to explain:

1. How the bar associations fit into the stream of our nation's history; the effects of the Revolution, of "Jacksonianism", of the Civil War, of industrialization, of the rise of the giant corporations, and more recently the effects of the "welfare state", policies and philosophy.

2. How do bar associations grow and why do they decline? Does the movement usually spread from local groups of lawyers whose common interests and pride bring them together?

3. Are bar associations self-serving in the narrow sense of selfishness? What, in many instances, broadens their outlooks?

4. Who are the bar association leaders in the various committees and what are their motives?

In sum, we can learn about our profession's organized action in the past so that we may better cope with what lies ahead for us and our nation.

You can help Dean Pound and the Survey by persuading your bar associations to answer (if they haven't already) these three questions:

1. When was your *present* association formed?

2. Why was it formed?

3. If it has had any periods of quiescence, why? And what, if anything aroused it?

Our address: Survey of the Legal Profession, 60 State Street, Boston 9, Massachusetts.

6. Page 287, Hurst, op. cit.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1951 Annual Meeting and ending at the adjournment of the 1954 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

An election will be held in the State of Florida to fill the vacancy in the term expiring at the adjournment of the 1953 Annual Meeting. The State Delegate elected to fill the vacancy will take office immediately upon the certification of his election.

Nominating petitions for all State Delegates to be elected in 1951 must be filed with the Board of Elections not later than April 19, 1951. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1951.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 19, 1951.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Harold L. Reeve

National Health Insurance:

Would an Income Tax Credit Solve the Problem?

by Sol M. Linowitz • of the New York Bar (Rochester)

■ The controversy over the President's proposal to set up a compulsory national health insurance program financed by a federal pay-roll tax has been raging for many months. Proponents cite statistics to show that the nation's existing medical facilities are inadequate, while opponents counter that "socialized medicine" will so dilute the high standards of American medical care that it will become totally ineffective. Mr. Linowitz proposes a middle ground: He agrees that there are not enough medical facilities in the country, but he also doubts whether compulsory health insurance is feasible. He proposes use of a federal income tax credit for premiums paid for private medical insurance to solve the problem.

■ For many months the American people have been subjected to a high-powered hullabaloo about national health insurance. Drums have been beaten with equal ferocity by proponents and opponents of the Administration's compulsory health insurance program. One group has vied with the other in broad characterizations, claims, charges, countercharges, high pressure campaigns and publicity build-ups. The medical profession, caught in the midst of the fray, has traded punches with the best of them. The average citizen, trying to understand what all the shouting is about, finds himself confused and concerned—and with good reason. For the state of our national health and the availability of hospital and medical care are among the gravest social problems with which we are today confronted.

Consider a few of the statistics. Our mortality rates look good on paper, yet over 100,000 babies die in the United States each year during their first twelve months of life. Our doctors are the best trained in the world, but there is only one for every 1700 people in some rural states. American medicine has made tremendous strides in maternity and prenatal care—yet only half of the mothers in the South have a physician's care at childbirth.

Illness is by all odds still our Public Enemy Number One. During any twenty-four hour period, over seven million Americans will be incapacitated by sickness. Measured in terms of our industrial production, more than one and one-half billion man-days are lost each year because of ill health. In terms of money, the total cost to our economy of sickness and disability exceeds twenty-five billion dollars annually.[1]

Nation Needs 40,000 More Doctors for Adequate Medical Care

We have about 190,000 practicing doctors in the country today—roughly one physician for every seven hundred people. This compares favorably with the ratio in most other countries. England has, under its compulsory health system, an average of one doctor for every 870 prospective patients; Australia, one for every 1,100; Ireland, one for every 1,500. Yet if our goal is an adequate supply of physicians throughout the United States, we fall considerably short in numbers and appropriate distribution. The Federal Security Agency estimates, without substantial contradiction, that we must have about 40,000 more doctors and at least 20,000 more dentists. Similarly, the supply of nurses is in need of considerable augmentation. In 1946 the National Nursing Council estimated that there was then a shortage of 41,000 trained nurses.[2] As to hospitals, the Federal Hospital Construction Acts have helped considerably in spurring added building. The fact is, however, that there are less than 7,000 hospitals in the country, with a total bed capacity of about one and one-half million—far short of the minimum standard requirements for the nation.

These are the grim indisputable facts which can be neither ignored nor glossed over. They are facts with which the greatest democracy on earth must deal in the interest of the general welfare of the nation. In submitting his National Health

1. *America's Health. A Report to the Nation*, National Health Assembly (1949).
2. *Report of Committee on Statistical Research*, National Nursing Council (August 1, 1946).

Program to Congress, President Truman said: "Good health is the foundation of a nation's strength. It is also the foundation upon which a better standard of living can be built for individuals. To see that our people actually enjoy the good health that medical science knows how to provide is one of the great challenges to our democracy."

In the face of this challenge, all factions—regardless of their attitude toward the compulsory insurance program—are agreed on certain fundamentals:

First, we must have more hospitals built and more doctors, dentists and nurses trained if we are to meet the country's health problem effectively.

Second, public funds—federal, state or local—must be made available to provide medical care or insurance for those unable to pay the cost.

Third, prepaid medical and hospital insurance should be made effective on a nation-wide basis to protect as many as possible against the cost of ill health.

Objections Are to Proposed Method of Achieving Nation-Wide Insurance

The hue and cry which has arisen in connection with the Administration's National Health Program is directed almost wholly against the method proposed to achieve the third objective, nation-wide health insurance. The Administration's plan would impose on both employer and employee a compulsory payroll tax of one and one-half per cent of the worker's earnings up to $4800 per year. The self-employed would pay 3 per cent. On its face, the bill purports to offer fairly comprehensive medical and hospital insurance to the 85 per cent of the population it is designed to cover.

How is the plan supposed to work? John Dykes is married, has two children, and earns $4,000 per year. Under the compulsory program, Dykes pays a payroll tax of $60 per year to insure himself and his family. His employer also pays $60. Dykes gets a card which ostensibly entitles him to virtually unlimited medical care and fairly complete hospital service. Theoretically, Dyke's family doctor will be free to join the program or not, as he sees fit. If he joins he will treat Dykes and be paid, at his election, on the basis of (1) per capita charge (a fixed allowance per patient), (2) a fee-for-service (established pursuant to an approved schedule), or (3) an agreed salary.

The spokesmen for the Administration's plan contend that this type of compulsory program is the only feasible answer to the health care problem. Voluntary insurance programs have, they maintain, failed to do the job and give little promise of doing so in the future; only three and one-half million Americans today have fairly comprehensive medical and hospital insurance. In answer to the frequently hurled charge of "socialized medicine", they assert that the program will in no way shackle the practitioner, will permit him freely to choose whether or not he wants to participate in the plan, and will leave unchanged the confidential doctor-patient relationship.

The opponents regard the compulsory program quite differently. To them it represents a costly and dangerous experiment which would detrimentally affect the standards of medical care. In view of the shortage of doctors, dentists, nurses and hospitals, they say that the quality of medical service throughout the nation will necessarily deteriorate if one hundred twenty-five million people are suddenly offered broad health care. The Administration's plan, according to them, promises what it can never deliver. Moreover, the establishment of a federal agency to supervise and administer the program as required under the bill will inevitably embroil doctors and hospitals in red tape, bureaucratic controls and governmental interference with the relationship between patient and physician. Should the plan go into effect, they say, doctors will have no choice: they will have to join if they want to survive. Finally, they contend that since sixty million Americans are today enrolled of their own free will in some form of health insurance, there is every reason to believe that the country's needs can be met effectively on a voluntary basis without resorting to the drastic compulsory method proposed by the Administration.

With the lines thus fairly sharply drawn on this issue, John Dykes finds himself caught in the middle. On the one hand, he is offered the opportunity of getting rather complete medical and hospital insurance at low cost. On the other, he is warned that he is incurring a grave risk which may endanger the health of himself and his family. Understandably enough, Dykes asks: "Where do I go from here?"

Where *does* he go? Must he choose at his peril between two such diametrically opposed positions? Or is there an alternative which will afford him necessary health care at the same low cost yet on a completely voluntary basis?

Credit Against Income Tax May Be Solution

Suppose the Government were to provide that each person who insures himself and his family against the cost of hospital and medical care in an approved commercial or non-commercial program would be entitled to a special tax credit or allowance for a designated part of the cost of such insurance. Blue Cross, Blue Shield and other existing groups would undertake to make such insurance available throughout the country. In addition, each community or group would be free to institute programs best designed to meet its own requirements. In some areas, the state itself might seek to offer such insurance to its citizens. As an illustration, John Dykes earning $4000 annually should be able to get a satisfactory type of health insurance policy for himself and his family at a cost of about $125 per year. At the present time Dykes pays a federal income tax of $213. If he should obtain such health insurance, however, he will be permitted to deduct $75 from the tax he would otherwise have to pay. In short, the Government would absorb $75 of the cost of such insurance and Dykes would pay $50.

Would not such a proposal substantially meet the objections voiced against the compulsory program, yet lead to broad voluntary health insurance coverage? The advantages of such an approach are fairly obvious:

1. It would avoid the necessity for the involved and costly governmental regulatory system which is an essential part of the compulsory plan.

2. It would rely for the most part on existing insurance groups established to handle just such a program.

3. It would permit voluntary arrangements to be made by each community or group in such manner as will best meet its particular needs.

4. It would avoid any interference with or encroachment upon the existing pattern of doctor-patient relationship.

5. It would spur the growth and development of present voluntary health insurance programs throughout the country.

6. It would *induce* rather than *compel* national health insurance.

Implementation of such a plan would, of course, raise a number of questions. How much will it cost? How about those people who do not earn enough to pay an income tax and who would therefore not be able to obtain any advantage from such a proposal? How do we know the plan will work?

The item of cost is of tremendous importance. But it must be examined in the light of the reasonably foreseeable cost of the compulsory program. The Administration concedes that wage earners and employers will have to contribute approximately six billion dollars per year at the outset if the compulsory plan is to be effective. Moreover, additional billions will admittedly be required to administer the plan through a federal agency on a nation-wide scale. The best objective estimates of cost indicate that the compulsory plan will entail a cost of eight to ten billion dollars per year. Furthermore, as experience in England and other countries indicates, the cost may reasonably be expected to rise sharply once the plan is put into effect.

Tax Credit Would Eliminate Cost of Administration

A considerable part of the compulsory program cost would be that involved in organizing and maintaining the required federal supervisory agency. Estimates of the attendant expense have differed widely. On the basis of all the facts, the addition of several hundred thousand to the federal payroll may reasonably be expected. Some analysts, relying on the findings of the Hoover Commission with respect to operating costs of the Veterans Administration, believe that there will have to be one government employee for every hundred insured—or a total federal personnel of about 1,200,000. Regardless of the precise figure, however, it is abundantly clear that the administration of the compulsory plan would cost billions of government dollars. The elimination of this cost in the tax allowance proposal is itself a very considerable factor in its favor.

Furthermore, the actual tax loss to the Government by virtue of the tax credit program would obviously be under the direct control of the Government itself in setting up the plan. The type and size of the tax credit actually offered would have tremendous bearing on the total cost factor. In this connection, the authorized tax allowance or credit might well vary in the different tax brackets, making the greatest allowance—thereby offering the greatest inducement—to those in the lowest income classes. Thus, if John Dykes earns $4,000 per year he might get a credit of $75; if he earns $3,000 the credit might be $90; if he earns $5,000, it might be $60.

The success of the program in leading taxpayers to obtain insurance will also play an important part in the eventual cost, since premiums will be directly affected by the number of people covered. Under any circumstances, it can safely be assumed that the tax allowance plan could be effectively implemented at considerably less cost than that involved in the compulsory program.

How about the people who don't pay taxes? Obviously, the tax allowance program would not meet the health insurance needs of those who are already exempt from paying an income tax. By the same token, however, and as the Senate Subcommittee on Health and Education recognized,[3] no health insurance method would of itself be applicable to the unemployed or to the lowest income groups. The Administration's plan, therefore, makes separate provision for their care through public funds.

There have been introduced in Congress two bills—one by Senator Lister Hill,[4] the other by Senator Robert Taft[5]—which would provide federal and state funds for medical care or health insurance for those unable to pay full cost. Both bills provide that the state shall be responsible for obtaining health insurance or other appropriate medical

Gold Tone Studio

Sol M. Linowitz practices in Rochester. A graduate of Hamilton College, he received his legal education at Cornell Law School where he was editor-in-chief of the *Cornell Law Quarterly*. He was a lieutenant in the Naval Reserve during the war and also served as Assistant General Counsel of the OPA in Washington.

3. Interim Report, Subcommittee on Health and Education, pursuant to S. Res. 62 (July, 1946).

4. *The Voluntary Health Insurance Bill* (S. 1456, 81st Congress) sponsored by Senators Hill, O'Conor, Withers, Aiken and Morse.

5. *The National Health Bill* (S. 1581, 81st Congress) sponsored by Senators Taft, Smith (N. J.) and Donnell.

care for such persons, but payment toward the cost may be demanded of those who are able to pay part, but not all, of the expense. A simple answer in connection with the program here proposed would be to combine the tax allowance plan with either the Hill Bill or the Taft Bill. All nontaxpayers could be deemed to be persons unable to pay the full cost of health insurance and therefore entitled to such insurance at public expense. Any nontaxpayer deemed financially able to do so, however, would be required to contribute toward the cost. Combining the tax allowance plan with the Hill Bill or Taft Bill would result in health insurance legislation truly national in scope yet entirely voluntary by nature.[6]

The suggestion that the income tax field be used to foster a governmental social purpose is by no means novel. Today we have, for example, deductions for charitable contributions, designed to encourage support of charities. In New York State, taxpayers are permitted to deduct up to $150 paid for life insurance premiums. The purpose—to encourage life insurance. Our federal tax laws, have, as a matter of fact, already taken the first step in the direction of the proposal here made: health insurance premiums may, under existing regulations, be included in determining the right to a tax deduction for extraordinary medical expenses.

The considerations here set forth led Representative Kenneth B. Keating to introduce a bill in Congress recently based on this proposal and providing a schedule of income tax credits for premiums paid in private health insurance programs. (H. R. 483, 82d Congress). Support from medical societies[7] and other groups[8] and expected endorsement by several legislators on both sides of the aisle should help to keep the plan moving through the congressional hopper when Congress is once more able to turn its attention to domestic matters.

Will the tax allowance plan work? The only way to find out is to try it. If it operates to induce widespread health insurance, the need for a compulsory system will be obviated. If not, resort can always be had to the type of program the Administration now seeks. The time is not yet, however, for plunging headlong into a far-reaching compulsory health program which is in so many respects beset with so many dangers. Experience abroad demonstrates that compulsory medical care is no panacea, and that once the step is taken there can be no turning back.

To the factions engaged in spirited battle on the health insurance front, the tax allowance plan would seem to offer a simple, sensible middle road toward the common goal. To the millions of John Dykeses, it holds out the real possibility that the fight against the ravaging cost of ill health can yet be won on a voluntary nation-wide basis.

6. The Flanders-Ives-Herter-Javits Bill (S. 1970, H. R. 4918, 81st Congress) known as the *National Health Act*, proposed to attain a similar objective by federal-state subsidies to voluntary health insurance organizations with a view to encouraging enrollments and new voluntary plans. Subscribers would pay a percentage of income rather than flat premiums and a "yardstick of services" would be prescribed.

7. The proposal has been endorsed by three county medical societies (Monroe, Yates, and Broome) in New York State.

8. A similar recommendation was made by the Bureau of Health and Hospitals of the National Catholic Welfare Conference, the National Conference of Catholic Charities and the Catholic Hospital Association. This proposal called for "a deduction of premiums up to $75.00 for health insurance from the net income tax of all individuals in the lower income brackets, i.e. up to $5000.00".

A Message of Appreciation from the Inns of Court

■ John W. Davis, of New York, Chairman of the Association's Special Committee on Restoration of Inns of Court, England, has received the following letters from the Treasurer of Middle Temple and the Treasurer of Gray's Inn:

THE HONOURABLE SOCIETY
OF THE MIDDLE TEMPLE
The Treasury
Middle Temple
London, E. C. 4

24th October, 1950

Sir Henry MacGeagh, GCVO., KCB.,
KBE., KC.,
Treasurer

My dear Davis:

At a Parliament of the Masters of the Bench of this Inn held on 19th October last, it was my very pleasant duty, as Treasurer, to inform my fellow Benchers of the generous gift of the American Bar Association collected through you and your fellow committeemen for the restoration of the Inns of Court.

My brother Benchers have asked me to express to you and to those connected with you their profound gratitude and thanks for this munificent gift not only for the practical form it took but also for the spirit of friendship it so clearly indicates as existing between lawyers of our two countries.

It is our unanimous desire that this gift be commemorated in some form in the Middle Temple Hall, either by the erection of a plaque, or by an inscription put up in a suitable position. When the final details of this have been determined I will send you fuller information.

With kindest regards,

Yours most gratefully,
HENRY MAC GEAGH

Pension Chamber
Gray's Inn
London, W. C. 1
December 14, 1950

Dear Mr. Davis:

As Treasurer of Gray's Inn for the current year I am writing to you to express through you to the American Bar Association the profound thanks of this Inn for our share of the generous gift of the Association which was collected for the restoration of the Inns of Court.

I expect you have heard that our Hall is in process of restoration almost exactly in its prewar form, the only alteration of importance being the addition of a new South Bay.

We have decided to allocate your gift to the building of this South Bay, which will bear an inscription with the arms of the United States of America in the glass window.

Finally I wish to say how delighted we shall all be to welcome any of your members, should they visit this country at any time, and to express in more tangible form the deep gratitude which we feel for your great kindness.

Yours sincerely,
A. C. COMYNS CARR
Treasurer

Wartime Work by Lawyers for the Navy:

A Tribute to Lawyers-at-Arms

by Louis E. Denfeld • Admiral, U.S.N. (Ret.)

■ Admiral Denfeld spoke at the last annual meeting of the Law Society of Massachusetts which is now merged with the Massachusetts Bar Association. In his opening remarks he said that at the outset of World War II he thought of lawyers as "a dime a dozen" but that experience had opened his eyes and he welcomed the opportunity to speak of lawyers' work for the Navy and to pay a tribute.

The topic of wartime work by lawyers is one of the subjects being studied by the Survey of the Legal Profession whose Director heard Admiral Denfeld and asked permission to use the Admiral's notes as a Survey report. The notes are here reprinted without any editorial changes.

■ The Navy owes a vast debt of gratitude to the lawyers of this nation for professional services rendered. In acknowledging this debt I refer particularly to war work of Navy lawyers—both civilian and uniformed. Before the war the Navy had no professional lawyers as such in uniform, and only a handful of civil service attorneys. During the war, however, more than 11,000 lawyers served in uniform with us and, in addition, we needed and obtained the services of many distinguished lawyers who came to us in their civilian capacities. Of course, most of the more than 11,000 Naval Reserve officer-attorneys did not perform legal duties during the hostilities. The vast majority of them were fighting members of the Navy's team, and the success of the Navy as a fighting team is a fact attested by history—not a mere theory.

But although the winning of the war is written in history, somehow history has little to say concerning the many types of work other than fighting essential to win a war. There was a tremendous job of legal work that had to be done. Most lawyers are familiar, generally, with the military law part of this job. Such law is the underlying basis of all discipline, and no war can be won by fighting services which have not discipline. Thus the Navy found it necessary to conduct some 10,000 general courts martial during the war years, and, for lesser offenses, 300,000 summary courts were held. You can easily visualize the magnitude of the legal services required in connection with the trial and revlew of so many cases.

Navy Needed Huge Law Firm of Its Own

What most lawyers probably do not know is that during the war years the Navy found it necessary to operate one of the largest law firms ever to engage in the practice of law. The Navy's need for the services of this law firm of its own arose because in addition to operating the greatest naval military machine in history, the Navy was conducting a gigantic business enterprise. Its buying and construction program for the war years involved approximately $100,000,000,000. It operated either directly or through private contractors approximately $3,000,000,000 worth of Navy-owned industrial facilities. This huge business program inevitably produced a multitude of legal problems covering the whole field of commercial law and required the services of a force of skilled attorneys.

The group of 125 lawyers who handled the Navy's commercial law problems was operated like a civil law firm rather than a governmental bureau. This arrangement proved highly effective and efficient. Peacetime purchasing methods had become obsolete. Competition in the usual sense was almost nonexistent. The paramount considerations were maximum production and maximum speed. Usual government purchasing procedures involving advertising and competitive bids and awards were too slow. This group of lawyers successfully cut through barriers of red tape and solved with celerity the thousand and one unprecedented legal problems created by the Navy's wartime needs.

Navy JAG Handled All Taxation Problems

In addition to the Office of General Counsel of the Navy, the work of which I have just described, other large legal workloads were carried by the long-established Office of the Judge Advocate General, which was staffed largely by Naval Reserve officer-lawyers. This legal office handled,

for example, all taxation problems raised by the Navy's procurement and expansion program.

Early in the war it became apparent that large sums were being paid out of naval appropriations to contractors for state and local taxes which were assertedly applicable to defense and war contracts. Myriad tax problems arose out of state and municipal taxes on sales and use, gross receipts, solvent credits, possessory interests, real estate and employment. The broad immunity of the Federal Government from such types of taxation, which might have furnished a blanket answer to these problems, was swept away by a decision of the Supreme Court of the United States in November, 1941. The Court then held that contractors under existing cost-plus-a-fixed-fee contracts were subject to state and local sales and use taxes upon purchases used in the performance of contracts.

It thus became desirable to constitute the Government the purchaser and thus avoid the impact of such taxes upon naval appropriations and the Federal Government's funds for fighting the war. The magnitude of the legal job may be visualized through the fact that just one of the Navy's six contracting bureaus, the Bureau of Yards and Docks, spent over $1,600,000,000 for personal property purchased through cost-plus contractors. Most of these contracts were performed in states having sales and use taxes. Since the average tax rate was 2½ per cent, it is apparent that the tax savings involved were substantial. Literally scores of millions of dollars were saved by legal services rendered the Navy in the tax field. The work of this branch has been continued. Even since the end of the war more than $3,500,000 has been recovered by the United States as a result of refunds by contractors of excess profits, resulting in the return to the Federal Government of taxes paid to the states on such profits. During the war another type of tax problem arose out of real property taxes levied on Navy-owned property in the possession of contractors. In fifteen of the states there were cancelled, refunded or abated assessed taxes amounting to more than $2,500,000 on government-owned property. These savings were also brought about by effective legal services in the field of taxation.

Record in Disposing of Torts, Admiralty

In the field of general law, naval officer-lawyers in the Judge Advocate General's Office were called upon to handle the legal aspects involved in the settlement of scores of thousands of tort claims resulting from the operation of thousands of motor vehicles and airplanes. Because of the vast expansion in the number of ships operated by the Navy, the services of admiralty lawyers also were required, and the admiralty law division promptly and satisfactorily disposed of $1,700,000 of admiralty claims against the Navy and collected $700,000 for damages done to naval vessels, during the course of the war years. The admiralty section handled also such spectacular prize proceedings as those in connection with the *Europa,* the largest vessel ever condemned by prize court.

Before I leave the subject of legal services rendered by the Bar to the Navy, I must mention the vast legal assistance program instituted in wartime and in which more than 27,000 civilian lawyers co-operated. We had also over 1100 naval officers and enlisted men who were lawyers and who gave legal advice and assistance to members of the naval service and their dependents. These legal assistance officers handled over 1,500,000 cases—a record of which the Navy is justly proud, and for which we want to thank you.

Committee on Law Lists

■ On January 30, 1951, the Standing Committee on Law Lists of the American Bar Association issued a Certificate of Compliance to The Mercantile Adjuster Publishing Company, 10 South LaSalle Street, Chicago 3, Illinois, for the March, 1951 Edition of The Mercantile Adjuster.

On March 12, 1951, the Committee issued a certificate to the Legal Directories Publishing Company, 5225 Wilshire Boulevard, Los Angeles, California, for the 1951 edition of the Pennsylvania Legal Directory.

"Books for Lawyers"

THE MIND'S ADVENTURE, RELIGION and HIGHER EDUCATION. *By Howard Lowry. Philadelphia: The Westminster Press. 1950. $2.50. Pages 154.*

It gives me great pleasure to call the attention of lawyers, educators, churchmen and editors to this interesting and informative little book. The author is an educator—formerly Professor of English at Princeton University, now President of The College of Wooster. The book indicates what might—and should—have been done to counteract the destructive, materialistic, and immoral Marxist revolution which has done and is doing so much to destroy our Christian civilization. It states:

> The charge now deepens in many quarters that education has not led in nourishing the highest values society needs; that it has even refused a full consideration of what the values suggested by Christianity are and of what Christianity itself is. The universities have given the world the guidance it needed in science, economics, and sociology, but not in the knowledge of good and evil. Hence they have failed to help civilization where it most needs help.

As the subtitle indicates, the book deals directly with religion and education. It therefore speaks of modern secularism, humanism and scientism and shows how such teaching has "produced that twentieth-century creation par excellence, 'the hollow man,' . . . for whom life seems to be little more than what Clarence Darrow once said it was, 'an unpleasant interruption of nothingness' ". Against this arid outlook on life the book portrays the vitalizing force of the religion which prompted and sustained the men who established our civilization and founded our country.

An apt quotation from a report by sixteen well-known and respected scholars, after they had discussed education and religion with the faculties of fifty-three colleges and universities in 1945-46, reveals the prevailing attitude. The report said:

> . . . in many institutions the majority of the faculty with whom they talked are either hostile to or indifferent toward religion.
>
> . . . Most of them seem to rely on garbled childhood memories to tell them what religion is and their familiarity with the literature and living spokesmen of liberal religion was strangely scant for cultivated and intelligent people. Occasionally faculty members denounced religion as "superstition", "pre-scientific benightedness," and "an emotional crutch," "both useless and dangerous." A larger group were convinced that a humanistic or naturalistic creed was wholly adequate for a modern man.

Is it any wonder that so many students have become victims of the economic determinism and immoral materialism of the Marxist revolution?

The last chapter relates the thesis to our ideas of government and law. The following quotation, selected from many equally attractive and pertinent, will serve the purpose of this review:

> Cicero and his refined Roman contemporaries found a kind of equality in human beings because they could reason correctly and thus express a kind of universal reason operating through all things. But the democracy of seventeenth century England, and the democracy of Emerson and Whitman and Abraham Lincoln, had a more profound and more deeply human base. It was something more than political freedom—the freedom of those who felt themselves immortal persons of divine origin, valuing themselves even while they knew their dependence upon a power not themselves. Out of this they valued other persons also. It was not a democracy of logical heads, expressing some universal syllogism. It was a democracy of the sons of God bound therefore in brotherhood, bearing His high mark upon their souls. John Marshall believed, of course, in abstract justice; but he attributed it to the Creator and held our Constitution to contain some divine ideas. A few years after him Justice Storey maintained that all high principles of society are eternal obligations arising from our common dependence upon God, and among these—as the prophet Micah saw in an earlier time—is our duty to do justly, to love mercy, and to walk humbly with our God. As Professor Hocking has brilliantly observed, democracy is a life that tries to combine a maximum of self-realization with a minimum of self-interest. This is the heart of Christianity. He has seen too that the practical working of a democratic state, as opposed to an anarchy, is change under law. The power of a vital religion is that it is, simultaneously, conservative and revolutionary. It sensitizes the conscience, creating respect for law; and it promotes change because it possesses an absolute, eternal standard for judging our imperfect relative procedures. This was the insight of our fathers.

That insight is the very antithesis of the principles of the Russian revolutionaries. It is the insight which must be nourished and preserved if our way of life is to survive.

The book is not for the professions only. It is attractive and easily understood. The author's style is gracious and charming.

ROBERT N. WILKIN
Cleveland, Ohio

PREVENTIVE LAW. *By Louis M. Brown, Assisted by Edward Rubin. New York: Prentice-Hall, Inc. 1950. $4.25. Pages ix, 346.*

In the sixty cities where they now function, Lawyer Reference Services make it possible for a person who wants a lawyer to get in touch with one under suitable circumstances, to

wit: (1) bar association auspices and (2) a fixed fee for the initial conference.

But what about the person who doesn't know he needs a lawyer? Or, as too often happens, realizes his need after it's too late for the lawyer to be of much help? Louis Brown in *Preventive Law* deals with the methods and techniques that will enable people to determine and to evaluate the symptoms of legal trouble in the early stages. By so doing, he believes, they themselves will often be able to take care of their legal problems successfully ("legal hygiene and first aid") and they will know when to invoke the aid of lawyers.

Preventive Law was designed for laymen, especially college students, not lawyers, nor, in my opinion, law students. Doctors can learn little from manuals on first aid. The book has been adopted for classroom use by two colleges in North Carolina, one in Virginia, one in Los Angeles, and also by U. C. L. A., U. S. C. and New York University. At N. Y. U., the publisher informs me, it is being used in the law school, as it is at U. S. C. where Mr. Brown himself teaches the course.

Although a lawyer has no need to read this book for the elementary law it contains or to be sold on the stitch-in-time approach, he may be interested in seeing how well Mr. Brown acquits himself in a dangerous but vital task. Dangerous because the layman reader, like the layman reader of "home doctor" books, is apt to rely on the book when he really needs professional assistance. Vital because a great many persons fail to realize their need for legal assistance,—sometimes never, frequently too late.

The "handy legal adviser" type of book is a familiar sight on newsstands. As early as 1880 one of these books, with the subtitle "How To Be Your Own Lawyer," was published in Philadelphia. Their popularity is based on the layman's quest for certainty and solace via the printed page—and his hope that he'll thus avoid paying a lawyer's fee.

Mr. Brown does not pander to the layman who seeks black letter law for immediate personal use. He starts out by explaining how preventive law works and then how to use it. The main idea, he says, is to "minimize risks". This is best done if the reader becomes familiar with "warning signals" such as questions with respect to money, property, status, injury, unusual facts, demands, notices, bequests, feeling or expectation of injury.

Rather than the theoretical approach he uses when discussing "the scope of the law", I think the author would have been more understandable, by laymen and lawyers alike, had he dealt with the kinds of cases most often occurring, that is landlord-tenant, domestic relations, etc. Legal aid and judicial council statistics could help him here. The law has enough abstractions.

Mr. Brown properly makes no claim to having all the answers. He just says that minimizing some legal risks is better than minimizing none. He often says "see a lawyer" and he asks: "Why should we not see our lawyer once a year for an inventory of our legal rights and duties?" (page 34)

At his worst Mr. Brown tosses off such "precautionary rules" as "follow the golden rule test", "avoid intentional wrong", "avoid careless conduct". He does go on to list four common pitfalls in criminal law in this instance and, as he becomes more specific, he is more useful—and more dangerous to the man who aspires to be his own lawyer. If the reader is merely alerting himself to pitfalls, there is no danger, but indeed a great advantage.

This attractively printed book will no doubt account for a good many amateur lawyers of the "guardhouse" or "sea" varieties known in the Armed Services. On the other hand, if its use in liberal arts colleges and business schools increases, as I hope it will, we can expect that its readers will gain a clearer idea of how lawyers can help them. I don't believe a course based on it belongs in the law school itself, although certainly the idea of "preventive law" should be emphasized in any law school curriculum.

Perhaps the book could have more accurately been called *The Use of Lawyers* or *When To Call A Lawyer* or *Lawyers: When You Need Them and When You Don't. Preventive Law* implies the existence of an integrated body of law of a particular kind, which is not the case. Actually, a law itself prevents nothing. The emphasis should be on the *lawyer*, not on an entity as fearsome and vague as the "law".

Louis Brown's *Preventive Law*, my objections to the title notwithstanding, deserves the success it is having. The sooner lawyers dispel the mystery of their profession through such careful expositions, the sooner new clients will pay them visits—in greater numbers and more often than not before their troubles are largely a matter of picking up the pieces.

CHARLES O. PORTER
Boston, Massachusetts

PRIMER OF PROCEDURE. *By Delmar Karlen. Madison, Wisconsin: Campus Publishing Company. 1950. $6.50. Pages 525.*

In the complex and ever-expanding field of legal education today, the task of preparing America's practicing lawyer of the future is being rapidly assumed by theorists and academicians who seldom if ever see the inside of a courtroom, seldom have occasion to see or examine trial briefs, and who seldom concern themselves with the practical side of law.

This is a grievous error and a disservice to the majority of law students who expect to earn a living and build a place of civic responsibility and professional respectability in communities across the land, through the active practice.

Procedure books have become highly specialized and overly technical. Beginning law students are plunged into so-called "beginning" courses in procedure or pleading or practice without having first been provided with an opportunity to study basic procedural techniques.

Consequently, there exists a void between basic substantive law courses on the one hand and advanced procedure courses on the other.

Into this gap comes Karlen's *Primer of Procedure.*

As any practicing lawyer will testify, court procedure is the means whereby justice is obtained, and (as such) it is the most important phase of the law. Karlen's book starts the student, properly, toward mastery of that intricate science.

This book is appropriately named. It is a "primer" of procedure. It does not minutely examine any single phase of procedure. In a single volume, it does provide the beginning law student in procedure a working tool that will answer thousands of questions that go unanswered in the more advanced and specialized procedure works on the assumption that the point is so simple it is not worthy of treatment. Only the elementals of procedure are covered in *Primer of Procedure,* but they are covered with clarity, clearness and comprehension. Students contemplating that phase of their legal education in which they begin the study of the practice of law would do extremely well to devote a great deal of time and effort to this book. Similarly, practicing lawyers will find it useful as a refresher, especially if they have been absent from the practice for some time.

The first and major portion of *Primer of Procedure* is an analysis of a modern lawsuit, wherein is charted the course of an action through present-day courts. Particular attention is paid to the pleadings, the trial itself and procedure following initial judgment. A second section is devoted to law and equity and includes a discussion of certain reforms in our modern judicial system.

No book that has come to the attention of this reviewer—except Karlen's *Primer of Procedure*—contains a complete record of a trial. Every paper filed is reproduced, and certain other papers that *could have been filed* are inserted by the author to afford the inquisitive student ample opportunity to study a complete trial record. Many students — perhaps a majority—complete law school and enter private practice without having seen or used a complete trial record. This book should correct this long-standing error.

Appendix II is a condensation of the new Federal Rules of Civil Procedure, edited to about one-half their original bulk by the elimination of matter which is beyond the scope of an introductory treatment of procedure.

The book is unique in that it contains no case references and no footnotes. The text is informally written and is supplemented by and cross-referenced to the record of trial given in Appendix I, and the Federal Rules. By the use of this book, the tyro lawyer acquires two skills: the technique of reading statutory material without benefit of judicial explanation, and the ability to analyze working documents used in litigation. Ordinarily, neither skill is emphasized in the first-year law curriculum.

Primer of Procedure can be used as a supplemental work in the civil procedure courses, or can be used in connection with courses in trial practice, as a manual. For these purposes, it is highly recommended. As the procedure curriculum advances into more specialized categories, *Primer of Procedure* declines in usefulness. This, however, is its purpose. Closer study of particular aspects of procedure, such as pleading, is left to advanced courses. The book is not so much for lawyers as it is for those who want to become lawyers.

RALPH ROGER WILLIAMS
University of Alabama
Tuscaloosa, Alabama

CIVIL RIGHTS IN THE UNITED STATES. *By Alison Reppy. New York: Central Book Company, Inc. 1951. $4.50. Pages 298.*

This book deals with the extension of civil rights in litigation and by legislation during the years 1948, 1949, and a portion of 1950. The study is confined in time to this narrow period but it is very broad in the scope of the author's concept of civil rights. Its main value is as a reference work, showing recent trends. There are cited about five hundred court decisions, ten Federal statutes, three public laws, and the acts of eight state legislatures—too much to be analyzed adequately in a book of 298 pages. The author, however, has done remarkably well in the limited analyses for which he had space.

The subject has greatly expanded since Congress in 1789 proposed as the first Ten Amendments of the Constitution the Bill of Rights. These members of Congress, reserving to the states all rights not delegated to the Federal Government, would have been shocked could they have foreseen that in 1950 two California courts would void a state statute solely on the vague language of the United Nations Charter by which the signatories agreed to "promote fundamental rights and freedoms for all", thus upholding the "civil right" of a Japanese to own land contrary to the state law. The author cites as an example, of an infringement of the civil rights of stockholders of a ferry company, the requirement of the United States Government for free transportation of thousands of troops during the war across New York Bay. In another instance (the Melish case) he seems to overemphasize civil rights as against the law expressed in the Canons of the Episcopal Church and upheld by our courts. Civil rights are not to be given priority over all other rights and laws in every instance.

In view of the author's diligence in research and of his exceptional legal qualifications and in view of the need for an outstanding work of larger size, he might do well to undertake an expansion of this excellent book and perhaps come nearer to a full statement of what the law is in this rapidly growing field.

CHARLTON OGBURN
New York, New York

(Continued on page 297)

THE PRESIDENT'S PAGE

Blakeslee Studio

CODY FOWLER

■ The House of Delegates had a most constructive Mid-Year Meeting. The reports of the Sections and Committees reflected the amount of hard work done on the various programs. Their recommendations were carefully considered and, in many instances, aggressively debated. This was especially true of the resolution which called for reconsideration of the action taken in September in which it was recommended that all lawyers be required to take an anti-Communist oath periodically. It had been said that the action taken in September was not given sufficient consideration and was not the deliberate action of either the Assembly or the House of Delegates. This criticism cannot be leveled against the action taken at the Mid-Year Meeting. The question was thoroughly debated and careful consideration was given to the points pro and con. It was clear that it was the conviction of the large majority of the House that since citizens engaged in other walks of life are required to take such an oath, there is no reason why lawyers should not do likewise. I heartily agree with the action taken. I have no hesitation in taking an oath of allegiance and loyalty to my country.

The report of the Committee To Study Communist Tactics and Objectives was received with hearty approval and the factual information upon which its recommendations was based was enlightening, even to those of us who felt we knew something about the Communist platform and program. I hope that the contents of this report will be called to the attention of lawyers generally. We can no longer temporize with those who believe in Communism and its objectives.

My only regret is that I did not have sufficient time during the meeting to visit with my friends, both old and new.

The Conference of Bar Presidents was well attended and had a fine program. I am sure that each bar association executive present had brought to his attention information and programs which will be helpful to him and his association during the coming year.

On February 20, I introduced Clarence Manion, Dean of the School of Law, Notre Dame University, at a dinner given in his honor by the *Times-Herald* in Washington, D. C. Dean Manion is the author of the recently published book, *The Key to Peace*. This little book compares our Government with the communistic governments and makes crystal clear why our people are successful, happy and free. It is written in language that can be understood by all, including students in our high schools. Through the generosity of one who believes that we ought to know the principles of our Government and be able to defend them, I was able to present each member attending the Mid-Year Meeting with a copy of the book. It received general acclaim. Many stated that they expected to go home and raise funds to see that this book is made available to the people of their respective localities. If you wish to do something concrete to help our people understand America as it is, you could not do better than make this book available to school teachers and others in your community. Address any communications regarding this book to Arthur Conrad, President, Heritage Foundation, Inc., 75 Wacker Drive, Chicago, Illinois.

Since I last reported to you in this page, I attended a meeting of the Savannah Bar Association on February 14. Attorney General J. Howard McGrath was among the speakers at these sessions. I attended a meeting of the Survey of the Legal Profession on the morning of February 15; the mid-year meeting of the Massachusetts Bar Association on February 16; and a meeting of the Indianapolis Bar Association on March 1.

In February I received an invitation from the Law Council of Australia to visit Australia next August in connection with a Jubilee Celebration of the Founding of the Commonwealth of Australia. The invitation was likewise extended to Chief Justice Vinson and Justice Frankfurter. No invitations were extended to representatives of any nations other than members of the British Commonwealth and the United States. Chief Justice Vinson and Justice Frankfurter have informed me that they will be unable to attend. The Attorney General, the State Department and the Australian Embassy have urged me to accept as a representative of the lawyers of this country. It was a pleasure and honor to accept this invitation from a country which has been a friend and an ally of long standing in a world in which we cannot have too many friends. I understand that Dean Erwin Griswold and his daughter have likewise accepted an invitation to attend this celebration.

The House of Delegates decided, upon the recommendation of the Board of Governors and the committee appointed to study the subject, not to purchase Salisbury House in Des Moines, Iowa, for our Headquarters Office, after deliberation. A committee has been appointed to study other possibilities for a new building located in or near Chicago. It is realized by all that the present

headquarters building is inadequate.

I have received a letter from David Hume, Head of the Legal Assistance Program, Office of the Judge Advocate General of the Navy, on behalf of the Judge Advocate General, Rear Admiral George L. Russell, thanking the Association for what he states is the very fine co-operation and work of the American Bar Association in the field of legal assistance to members of the Armed Forces and their families.

It is with pleasure that I announce that Edward B. Love, a successful practicing lawyer of Monmouth, Illinois, has accepted the position of full-time Director of Activities of our Association. He was the selection of a special committee whose recommendation received the unanimous approval of the Board of Governors. His acceptance was received too late to have his biography in this issue. However, in the May issue of the JOURNAL you will have full information regarding Mr. Love and I am sure that each member will be as happy in obtaining Mr. Love's assistance in the operation of our Association as I am. The work has grown to the point where a Director of Activities to assist the Sections, Committees and President in carrying out the programs and policies laid down by the Board of Governors and House of Delegates is essential to the constructive and expanding work of the Association.

P. S. Just prior to the adjournment of the House of Delegates meeting, I had the pleasure of announcing that the first male child in fifty years had arrived in my family—a son having been born to my daughter, Maude, Mrs. Lee F. Pallardy, Jr., that morning. I feel I have cause for rejoicing.

Agreement Ends Litigation Between Banks and Bar Association

■ To serve as a possible guide to lawyers in other localities, in effecting a better understanding and relationship between lawyers and trust institutions, we print below the agreement made last April (1950) between the Hennepin County Bar Association (Minnesota) and two Minneapolis banks. This agreement terminated litigation known as the "Bank cases" on the eve of trial.

AGREEMENT

AGREEMENT made this 24th day of April, 1950, by and between the signatory trust institutions and the Hennepin County Bar Association.

WITNESSETH, That

Whereas, the business of said trust institutions includes the administration of estates and trusts; and

Whereas, legal services are required in connection with the conduct of such business, and the practice of law has by law been delegated and entrusted to attorneys at law duly admitted to the Bar; and

Whereas, the public interest can be best served by mutual understanding and harmonious relations between trust institutions and the members of the legal profession, and to that end the parties hereto desire to arrive at an understanding as to the matters herein stated;

NOW, THEREFORE, the signatory trust institutions do hereby severally declare and adopt the following policies and declarations and agree with the Hennepin County Bar Association and its members to observe the same in the conduct of their respective businesses, it being understood that either of the signatory trust institutions as to itself or the Hennepin County Bar Association as to all parties may terminate this agreement at any time upon six months' advance written notice to the other parties hereto:

1. Advertising by a trust institution which, in effect, merely states that the trust institution is authorized to act as a fiduciary in various capacities need not refer to lawyers. Advertising which goes further and invites the creation of fiduciary relationships through will or trust agreement with the trust institution, shall state in substance that the services of a lawyer are essential in advising as to the contents of and drafting the form of the instrument. If the trust institution advertises as to its charges for services as executor or administrator, the advertising shall also state in substance that services of a lawyer are also necessary in connection with its probate of an estate, and that the lawyer's fees will be in addition to the trust institution's charges. The trust institution shall not directly or indirectly offer to give legal advice or render legal services, and there shall be no invitation to the public in such advertising to bring their legal problems to such institution. The qualifications of the trust institution shall not be overstated or overemphasized and it shall not be stated in such advertising that the trust institution has or may have knowledge or information superior to that of an individual. References to lawyers shall in all instances occupy a prominent position in such advertisements, shall be clearly legible, and when practicable shall appear upon the first page thereof. The foregoing, so far as applicable, shall apply to oral, radio and other advertising as well as to printed and written advertisements.

2. The trust institution at an early conference with the customer shall furnish to him a printed copy of this agreement and at the same time shall request the customer to arrange for the participation of his lawyer in future conferences, such participation to include consultation and legal advice in planning the proposed fiduciary relationship, as well as the drafting by the lawyer of the requisite documents. If the trust institution's recommendation concerning the choice of a lawyer is asked, it shall urge the customer to select his own lawyer. In no instance shall the trust institution show a preference in favor of any attorney or firm of attorneys over any other attorney or firm of attorneys or suggest the employment of any particular attorney or firm of attorneys.

3. It is recognized that in many instances discussion by the trust institution with the customer discloses that the latter has a will; and it may be that in the interval between the execution of

(Continued on page 323)

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

David Andrew Simmons 1897-1951

In the morning of Saturday, March 24, 1951, Dave Simmons died suddenly.

He was one of the youngest Presidents of the American Bar Association.

None has held that exalted office as long as he did, for he was President for about fifteen months during the war years, 1944-45.

As President, of course, he was a member of the Board of Editors, *ex officio*. In 1949 he came on the Board as an elected member.

His appraisals of articles submitted for his judgment were thoughtful and penetrating analyses. His editorials were wise and well reasoned. One was in process of preparation at the time he died.

He was a man of matchless courage, unimpeachable integrity and unshakable loyalty. His character was above reproach, his scholarship and wit a constant source of joy to those privileged to count themselves in the magic circle of his friends. His ability as a lawyer was outstanding.

In a brilliant exposition of the subject of "rights" in the September, 1950, JOURNAL, he clearly pointed out the difference between rights and aspirations and declared that

> There is one fundamental right, and only one . . . the right to be let alone.

Always he made the most of the fine qualities with which he was so richly endowed. He fought the good fight to the very end,—gentle, firm and brave. It might have been written of him: "True courage is cool and calm. The bravest of men have the least of a brutal, bullying insolence, and in the very time of danger are found the most serene and free."

When Was Your Bar Association Organized?

Dean Pound has defined a profession by saying, "there are three essential ideas—organization, learning and a spirit of public service".

Organization in the legal profession means bar associations. In the Old World "the Bar" and "the organized Bar" are virtually synonymous terms. The French Bar traces itself back through the Middle Ages and claims descent from Rome. In England, the Inns of Court are institutions almost as ancient as the common law itself.

In the New World, the first bar association in Canada was organized in 1797 and has had an uninterrupted continuous history. In Lima, Peru, the College of Advocates now in existence was founded in 1811.

In the United States such colonial bar associations as there were died out during or shortly after the Revolution. The great resurgence of our bar associations apparently came after the Civil War. According to the few histories that have been written, our profession was unorganized, and perhaps disorganized, for virtually a century.

Such a phenomenon calls for examination as to its causes. But first the premise must be established beyond doubt. Strange as it may seem, we have no fully documented history of the bar association movement in the United States.

Some new facts have already been dug up by the Survey of the Legal Profession and the Survey suspects there may be many more.

An article printed elsewhere in this issue (see page 269) tells what a preliminary exploration has already unearthed. It asks those who have official records or personal knowledge to contribute their information. While this appeal is to all lawyers, it should be given special heed by bar association secretaries who have the records in their custody.

Until the basic facts have been nailed down, it is impossible to determine accurately why the climate of the United States seems to have been so hostile to bar associations for so long.

The Journal

The JOURNAL belongs to the members of the Association. It is their magazine. The Board of Editors has no objective other than to publish the best possible journal conforming as well as may be to the wishes of its readers. We cannot always please everybody, but we are never satisfied with our product; we are ever striving for improvement.

Certain limitations must be recognized: The magazine is not a law review, nor a house organ, nor a primer of how to practice law in forty-eight different states. But its contents must be kept in balance. Full length articles are indispensable,—but not articles of indefinite length. Simplicity and brevity not only are the soul of good writing but make it possible for the JOURNAL to offer more variety.

Material on subjects of current interest to general practitioners as well as specialists is highly desirable and necessary in due proportion. Here the line is difficult to draw between subjects of general interest and those too restricted in appeal because limited to the law of one jurisdiction or to a problem too narrowly circumscribed in application.

Many appropriate and interesting questions naturally suggest themselves: for example, matters involved in the practice of Administrative Law, Labor Law, Insurance Law, Federal Tax Law, Anti-Trust Law, Municipal Law, Mineral Law, Real Property, Probate and Trust Law, the Law of Wills, Torts, Trial Practice, Contracts, Corporation Law, Constitutional Law, Domestic Relations, Criminal Law, International Law and many others. Selection under any of these headings is not easy, for there is always the danger of over-emphasis on something of purely local or provincial interest.

The manifold activities of all the Sections and Committees of the Association are of constant and recurring interest. We plan to establish as soon as possible, a new department of a page or two on notes of Section and Committee work. There is also a definite place for full-scale treatment from time to time in this field.

In all of these things we need help. We welcome criticism and suggestions. We want to increase the number of our contributors while retaining the interest and activity of those who have so valiantly and faithfully supported us in the past; we need wider geographic distribution and greater variety of coverage.

Practical difficulties also pose continuing problems and cause recurring crises. These are difficult days. The cost of living is still rising, and our staff must eat; paper costs more; printing costs have increased; more members means more JOURNALS to be printed; the postoffice promises very substantial increase in postal rates; Social Security and pensions are now regular items; organized as we are, the maintenance of adequate advertising revenues is not simple.

None of all this is by way of complaint. It is merely an effort to outline some of our problems in the hope that more of our members will be inspired and able to give tangible help by contributing manuscript and good advice.

Review of Recent Supreme Court Decisions

COMMERCE

City Ordinance Forbidding Sale of Milk Not Pasteurized Within Five-Mile Radius of City Held To Be Undue Burden on Interstate Commerce

■ *Dean Milk Company* v. *Madison,* 340 U. S. 349, 95 L. ed. Adv. Ops. 228, 71 S. Ct. 295, 19 U. S. Law Week 4087. (No 258, decided January 15, 1951.)

Madison, Wisconsin, has an ordinance making it unlawful to sell any milk as pasteurized unless it has been processed and bottled in an approved pasteurization plant within a radius of five miles from the central square of the town. Another section of the ordinance bans milk unless from a source of supply possessing a permit issued after inspection by Madison officials, who are expressly relieved from any duty to inspect farms located more than twenty-five miles from the center of the city. The Dean Milk Company, an Illinois corporation engaged in distributing milk in Illinois and Wisconsin, challenged the validity of these provisions as an undue burden on interstate commerce. The Supreme Court of Wisconsin upheld the five-mile limit on pasteurization and ordered the complaint as to the twenty-five-mile limitation dismissed for want of a justiciable controversy.

On appeal to the Supreme Court, Mr. Justice CLARK reversed. Madison discriminates against interstate commerce, he declares, by "erecting an economic barrier protecting a major local industry against competition from without the State". This it cannot do, he says, since reasonable and adequate alternatives are available to it to safeguard its legitimate interest in protecting health. The city can inspect the milk produced beyond the five-mile limit and charge the actual and reasonable cost of such inspection to the importing producers and processors; he suggests, or it may rely upon the safety ratings of the United States Public Health Service of the specific plants or the milkshed in the distant jurisdictions. He vacates the judgment and remands to the Wisconsin Supreme Court so that it can pass upon the validity of the twenty-five-mile limitation set up in the ordinance.

Mr. Justice BLACK wrote a dissenting opinion in which he was joined by Mr. Justice DOUGLAS and Mr. Justice MINTON. He says that Madison's ordinance does not exclude wholesale milk coming from Illinois or anywhere else. It merely requires that milk sold in Madison be pasteurized within five miles of the center of the city, he declares, and there is no evidence that appellant is unable to have its milk pasteurized in that area. Like all health regulations, the ordinance does impose some burden on trade, he continues, but that does not mean that it "discriminates" against interstate commerce. He objects to the Court's use of the "reasonable alternative" doctrine in this field of the law, and says that the evidence leads him "to the conclusion that the substitute health measures suggested by the Court do not insure milk as safe as the Madison ordinance requires".

The case was argued by Jacob Geffs and George S. Geffs for appellant, and by Harold E. Hanson and Walter P. Ela for appellees.

COMMERCE

Price Differential Made in Good Faith To Meet Competition Held To Be Complete Defense To Charge of Price Discrimination Under Robinson-Patman Act

■ *Standard Oil Company* v. *Federal Trade Commission,* 340 U. S. 231, 95 L. ed. Adv. Ops. 205, 71 S. Ct. 240, 19 U. S. Law Week 4073. (No. 1, decided January 8, 1951.)

The issue in this case was the validity, under the Robinson-Patman Act, of a cease and desist order issued by the Federal Trade Commission directed against Standard Oil Company's practice of selling gasoline to four comparatively large "jobber" customers in Detroit at a lower price per gallon than it sold to many small service station customers in the same area. The company's defenses were that the sales were not in interstate commerce and that the lower price was justified under the Act because it was made to retain the jobbers as customers and in good faith to meet an equally low price of a competitor.

The Supreme Court, in an opinion written by Mr. Justice BURTON, reversed the Court of Appeals decision upholding the Commission's order. Answering the argument that the sales were not in interstate commerce, he notes that the gasoline was delivered to customers in Detroit from stores at a terminal at River Rouge. Since the demand was constant in the Detroit area, and could be accurately estimated, he says that the "temporary storage" in the River Rouge terminal did not deprive the gasoline of its interstate character.

As for the company's second defense, Mr. Justice BURTON says that, before the Robinson-Patman Act, Standard's evidence that it reduced prices bona fide to meet an equally low price of a competitor would have been material and, if accepted, a complete defense to a charge of unlawful discrimination under the Clayton Act. He overrides the Commission's holding that a lower competitive price is not a defense under Robinson-Patman if an injury to competition may result from the reduction. "There is nothing to show a congressional purpose", he says, "... to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs".

Reviews in this issue by Rowland L. Young.

Mr. Justice REED wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice BLACK joined. He says that the Robinson-Patman Act was largely designed to take care of the "need to allow sellers to meet competition in price from other sellers while protecting the competitors of the buyers against the buyers' advantages gained from the price discrimination". The Clayton Act had failed to solve the problem, he declares, and the impossibility of drafting fixed words of a statute so as to allow sufficient flexibility led Congress in the Robinson-Patman Act to put authority in the Federal Trade Commission "to determine when a seller's discriminatory sales price violated the prohibitions of the anti-monopoly statute . . . and when it was justified by a competitor's legal price". The Court's interpretation means that no real change has been brought about by the Robinson-Patman Act since it leaves what the seller can do "almost as wide open as before", he declares. He reviews the legislative history of the Robinson-Patman Act, saying that it supports his position, and discusses the language of the Act, interpreting it differently from Mr. Justice BURTON's majority opinion. He says that he believes that "good faith meeting of a competitor's price only rebuts the prima facie case of violation established by showing the price discrimination". Whether such discrimination violates the Robinson-Patman Act, he observes, "then becomes a matter for the determination of the Commission on a showing that there may be injury to competition".

The case was argued by Howard Ellis for Standard Oil, and by James W. Cassedy for Federal Trade Commission.

CORPORATIONS

Plan of Reorganization Held To Be "Fair and Equitable" Within Meaning of Public Utility Holding Company Act Although No Provision Was Made for Participation of Stock Option Warrants Which Had Market Value

■ *Niagara Hudson Power Corporation* v. *Leventritt, Securities and Exchange Commission* v. *Leventritt*, 340 U. S. 336, 95 L. ed. Adv. Ops. 272, 71 S. Ct. 341, 19 U. S. Law Week 4091. (Nos. 211 and 212, decided January 15, 1951.)

These cases were suits brought in the District Court challenging the validity of the Securities and Exchange Commission's finding that a plan of reorganization for the Niagara Hudson Power Company was "fair and equitable" within the meaning of Section 11 of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U. S. C. § 79k (b) although it made no provision for outstanding stock option warrants. The plaintiff, Leventritt, was a holder of such stock option warrants which had a definite market value. As to them the Commission held that there was no "reasonable expectation that the market price of Niagara Hudson common stock would exceed the exercise price of the option warrants within the foreseeable future. Accordingly . . . such option warrants have no recognizable value and . . . the plans satisfy the standard of fairness and equity with respect to such option warrants in excluding them for any participation in the reorganization of Niagara Hudson." Leventritt contended that, as a matter of law, the Commission had no authority to approve a plan that did not provide for participation by the outstanding warrants. The District Court overruled his contention and approved the plan. The Court of Appeals for the Second Circuit reversed and remanded to the District Court.

The Supreme Court reversed the Court of Appeals in an opinion by Mr. Justice BURTON. Respondent's objection, he says, is not primarily to the Commission's basing the investment value of the option warrants upon the relationship between their exercise price and the value of the common stock, but rather he contends that the Commission must as a matter of law give greater recognition than it has to the market value of the warrants themselves, arguing that the options in the warrants have a valuable "perpetual feature" since they may be exercised at any time without limit. This is partially false, Mr. Justice BURTON declares, for the option does not extend beyond the life of the common stock and there is no guaranty of the length of that life. This "premium value" of the warrants does not provide an adequate reason for assigning a value to them at the expense of the common stock in a reorganization, however, he continues. Under the Act, it is the informed judgment of the Commission rather than the market that is the "appropriate guide to fairness and equity", he declares, and, absent abuse of its discretion, "the Commission's approval of a plan is as lawful and binding when it recognizes a value of zero for a security as when it selects any other figure. . . . It is enough that the Commission, within its discretion, has given the warrants careful consideration and that under all the circumstances, including their market value, has found the plan to be fair and equitable . . ."

Mr. Justice FRANKFURTER, with whom Mr. Justice BLACK joined, dissented, with the brief statement: "I would have the Securities and Exchange Commission take another look, for the reasons indicated in Judge Learned Hand's opinion below".

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

The cases were argued by Randall J. LeBoeuf, Jr., for Niagara Hudson, by Roger S. Foster for the Securities and Exchange Commission, and by Victor Leventritt and T. Roland Berner for the respondent.

LABOR LAW

National Labor Relations Board Need Not Deduct from Award of Full Back-Pay to Discriminatorily Discharged Employees Sums Paid to Them as Unemployment Compensation by a State Agency

■ *National Labor Relations Board* v. *Gullett Gin Company, Inc.*, 340 U. S. 361, 95 L. ed. Adv. Ops. 224, 91 S. Ct. 337, 19 U. S. Law Week

4085. (No. 122, decided January 15, 1951.)

The National Labor Relations Board found that the Gullett Gin Company had discharged certain employees in violation of the National Labor Relations Act and ordered their reinstatement with back pay. The Board ordered deduction of the employees' net earnings and willful losses of wages, but refused to deduct certain payments by the State of Louisiana as unemployment compensation. The Court of Appeals for the Fifth Circuit held that such payments must be deducted and modified the order accordingly.

Speaking for the Supreme Court, Mr. Justice MINTON reversed. "To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent" he says. "Since no consideration has been given or should be given to collateral *losses* . . . no consideration need be given to collateral benefits which employees may have received." He answers the argument that the unemployment payments were direct, not collateral, by saying; "Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state."

Respondent's final argument was that it would be penalized because, under Louisiana law, it would be unable to qualify for a lower unemployment benefit tax rate to the extent that its employees received unemployment compensation. To this, Mr. Justice MINTON replies that the validity of a back pay order ought not to hinge on the myriad provisions of state unemployment compensation laws. Respondent's failure to qualify for a lower tax rate would be the result, not primarily of federal, but of state law, "designed to effectuate a public policy with which it is not the Board's function to concern itself".

The CHIEF JUSTICE took no part in the consideration or decision of the case.

The case was argued by A. Norman Somers for National Labor Relations Board and by Conrad Meyer III for the Company.

WITNESSES

Witness' Claim of Privilege Against Disclosing Confidential Communication Between Husband and Wife Valid Despite His Failure To Prove That Communication Was Privately Conveyed

■ *Blau* v. *United States*, 340 U.S. 332, 95 L. ed. Adv. Ops. 234, 71 S. Ct. 301, 19 U. S. Law Week 4094. (No. 21, decided January 15, 1951.)

Blau was summoned to appear before a federal grand jury where he declined to answer questions concerning the activities and records of the Communist Party of Colorado, relying on his constitutional privilege against self-incrimination. He also refused to reveal the whereabouts of his wife who was wanted as a witness in connection with the same investigation, asserting the privilege against disclosing confidential communications between husband and wife. He was sentenced to six months in prison for contempt of court; the Court of Appeals for the Tenth Circuit affirmed.

The Court, in an opinion by Mr. Justice BLACK, reversed. The courts below erred in failing to sustain the claim of privilege against self-incrimination, he said, for the reasons set out in *Blau* v. *United States*, 340 U. S. 159, decided December 11, 1950 (reviewed in 37 A.B.A.J. 143; February, 1951).

As for the claim of privilege not to disclose a confidential communication between husband and wife, he rejects the Government's contention that the privilege should be denied because Blau failed to prove that the information was privately conveyed. ". . . [M]arital communications are presumptively confidential [and the] Government made no effort to overcome the presumption. In this case, moreover, the communication to petitioner was of the kind likely to be confidential" he declares. "Petitioner's refusal to betray his wife's trust was both understandable and lawful" he concludes.

Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice MINTON, with whom Mr. Justice JACKSON joined, dissented on the ground that "Incompetency is the exception, and to bring one within the exception, one must come within the reason for the exception." It seemed to him that all that was shown in the case was communication and that the circumstances of confidence were absent. He thought the conviction valid even though unsupportable on one of the two grounds on which it was based. If the sentence were illegal that could, he said, be corrected on remand.

The case was argued by Samuel D. Menin for Blau, and by Philip B. Perlman, the Solicitor General, for the United States.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE Lydia A. G. Stratton • ASSISTANT

Aliens . . . naturalization . . . alien who left his wife and child, lived with a paramour within five-year period preceding filing of his naturalization petition, and failed to comply fully with court support orders cannot qualify for naturalization as person of "good moral character".

■ *Johnson* v. *U. S.*, C.A. 2d, January 24, 1951, L. Hand, C. J.

On appeal by the United States from an order admitting petitioning alien to citizenship, the Court of Appeals for the Second Circuit reversed the order and held that an alien who, two years after leaving his wife and child, began a "meretricious union" with a paramour which continued into a five-year period preceding the filing of his petition and who failed to comply fully with court support orders could not qualify for naturalization as a person of "good moral character". The Court asserted that it still subscribed to its decision in *Estrin* v. *United States*, 80 F. (2d) 105, that even a single lapse from marital fidelity, if there were no "extenuating circumstances", was inconsistent with the requirement of five years of unbroken "good moral character". It pointed out that the applicants in *Petitions of Rudder*, 159 F. (2d) 695, decided eleven years later, had proved the "extenuating circumstances", although the opinion admitted that the Court may have been too lenient in the *Rudder* case. The task imposed by the statute upon the courts was said to be "impossible of assured execution; people differ as much about moral conduct as they do about beauty". The Court continued: "There is not the slightest doubt that to many thousands of our citizens nothing will excuse any sexual irregularity, for some indeed this extends even to the subsequent marriage of an innocent divorced spouse. On the other hand there are many thousands who look with a complaisant eye upon putting an easy end to one union and taking on another. Our duty in such cases, as we understand it, is to divine what the 'common conscience' prevalent at the time demands; and it is impossible in practice to ascertain what in a given instance it does demand. We should have no warrant for assuming that it meant the judgment of some ethical elite, even if any criterion were available to select them. Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far the distinguishing features of each case would be morally relevant to one person and not to another. Theoretically, perhaps we might take as the test whether those who would approve the specific conduct would outnumber those who would disapprove; but it would be fantastically absurd to try to apply it. So it seems to us that we are confined to the best guess we can make of how such a poll would result."

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Bankruptcy . . . reorganization under § 77B . . . court may alter or modify plan of reorganization after entry of order of confirmation but prior to final order even though jurisdiction to do so not expressly reserved in order of confirmation.

■ *Prudence-Bonds Corp.* v. *City Bank Farmers Trust Co.*, C. A. 2d, February 1, 1951, L. Hand, C. J.

The question before the Court was whether or not a reorganization court in a proceeding under §77B of the Bankruptcy Act must expressly reserve in its order of confirmation the power thereafter to alter or modify the plan in order for it to retain jurisdiction to do so prior to entry of a final order of consummation. Section 222 of the Chandler Act provides for "alterations" or "modifications" before or after confirmation and requires that, when these affect the interests of creditors "adversely", they must be made upon notice to all. The Court held that Congress did not intend to condition the power upon the reservation of jurisdiction. "Our reason is that the section makes no distinction between 'alterations' and 'modifications' made before and after confirmation, so that we are safe in starting with the premise that, if a specific reservation of power is necessary to extend jurisdiction after confirmation, a similar specific reservation must be necessary in the 'plan' itself; for it would certainly be unwarranted to import the condition in one situation and not in the other when the same words cover both. Yet plainly it is not necessary for the 'plan' itself to contain a reservation giving permission to the court to alter or modify it upon confirmation, for the purpose of §222 is to accommodate the 'plan' to unforeseen changes after it has been 'approved.'" The Court held erroneous its earlier decisions in so far as they depended upon the presence of an express reservation in either the "plan" or the order of confirmation.

Contracts . . . illegality . . . testifying as expert witnesses to matters requiring a knowledge of engineering in water rate proceeding before the public service commission does not

constitute practice of engineering within intent evidenced by words of Pennsylvania statute and hence qualified but unlicensed expert witnesses are entitled to recover witnesses' fees.

■ *Lance* v. *Luzerne County Manufacturers Assoc.*, Pa. Supreme Ct., January 2, 1951, Jones, J.

The question presented on objections to a complaint was whether testifying as an expert witness to matters requiring a knowledge of engineering constituted the practice of engineering within the meaning of a Pennsylvania statute requiring the registration with the State Registration Board of any person seeking to practice the profession of engineering (Act of May 6, 1927, P.L. 820, 63 PS § 131 *et seq.*). Plaintiffs in this action, seeking to recover fees alleged to be due them for their services as expert witnesses and consultants in a water rate proceeding before the Pennsylvania Public Service Commission, were not licensed under the Act at the time the services were performed but had been deemed competent by the Public Service Commission to render opinions material to the inquiry being conducted.

Holding that plaintiffs were entitled to recover compensation for their services as expert witnesses, the Court ruled that such services did not constitute the practice of engineering since plaintiffs, in acting in that capacity, neither made plans nor directed "the control of the forces of and the utilization of the materials of nature" which § 2 of the Act of 1927 specified as distinguishing the "professional engineer." Stating that the justification of a registration statute as a valid exercise of the police power rested upon considerations other than an engineer's ability to testify as an expert before some tribunal, the Court deemed plaintiffs' qualification as experts a matter to be determined by the Public Service Commission on the basis of their knowledge and not their compliance with the registration statute. Although there was no appellate court decision in the state on the question, the Court noted the decision of the Court of Common Pleas of Lackawanna County in *Micciche* v. *Forest Hill Cemetery Association*, 55 D. & C. 620, that it was reversible error for a Referee of the Workmen's Compensation Board to reject, because the proferred witness was not licensed by the State Medical Board, the expert opinion of a chiropractor as to whether the accident in issue was the cause of the claimant's disability. The instant Court observed, however, that if it should be developed by the proofs at trial that some of the services by plaintiffs appeared to constitute the practice of engineering within the contemplation of the Act of 1927, but were segregable in quantity and value, plaintiffs might still be able to claim for the balance of their services not violative of the Act.

Corporations . . . Securities Exchange Act of 1934 . . . profits recoverable from corporate "insiders" for short-term transactions in corporation's shares held to be computed by matching any given sale against any given purchase in such way as to increase profits to greatest possible amount . . . six months' period held to be six months both before and after transaction.

■ *Gratz* v. *Claughton*, C. A. 2, February 6, 1951, L. Hand, C. J.

Action was brought to recover profits realized by defendant through transactions in shares of the Missouri-Kansas-Texas Railroad Company within a period of less than six months. Section 16 (b) of the Securities Exchange Act provides that such profits when realized by an officer, a director or a "beneficial owner" (one who holds ten per cent of the company's shares) shall "inure to and be recoverable by the issuer". Judgment was entered against defendant and, in this appeal, he challenged, *inter alia*, the rule adopted in computing his profits.

The Second Circuit had previously held in *Smolowe* v. *Delendo Corp.*, 136F. (2d) 231, that such transactions were not to be matched by identifying the shares dealt in and, in this decision, it reaffirmed that holding, pointing out that to construe the statute as limiting recovery to profits derived from transactions in the same shares would allow an easy avoidance of it and that, moreover, since it was impossible to identify any purchase with any previous sale, recovery from such transactions would be confined to the practically nonexistent occasions when the proceeds of the sale were used to purchase. It further held that the test could not be the intent of the fiduciary since intent was generally not ascertainable and since such a test would again allow avoidance of the statute.

Therefore, in the Court's opinion, one of two alternatives could be followed: to match any given sale, taken as the minuend, against any given purchase, taken as subtrahend, (1) in such a way as to reduce profits to their lowest possible amount, or (2) in such a way as to increase them to the greatest possible amount. The second alternative had been adopted by the master to whom the issue of the amount of profits made by defendant had been referred. The Court agreed that this method of computation was correct.

It stated: "The question is in substance the same as when a trustee's account is to be surcharged. . . . It is true that on the beneficiary in an accounting rests the burden of proof of a surcharge, although the fiduciary has the burden of establishing any credits. Since the plaintiff was seeking to surcharge the defendant we will therefore assume that it rested upon her to show how the transactions are to be matched; and, that, if there were nothing more, since she cannot do so, she must be content to have them matched in the way that shows the least profit. Obviously that cannot be the right answer, for the reasons we have given; and perhaps the fact that it cannot be, is reason enough for adopting the alternative. But there is another ground for reaching the same result. . . . Although it is impossible in the case at bar to compute the defendant's profits, except that they must fall between two limits—the minimum and the maximum—

the cause of this uncertainty is the number of transactions within six months: that is, the number of defendant's derelictions. The situation falls within the doctrine which has been law since the days of the 'Chimney Sweeper's Jewel Case,' but (sic) when damages are at some unascertainable amount below an upper limit, and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.

"This results in looking for six months both before and after any sale, and not for three months only, as the defendant insists. If one is seeking an equation of purchase and sale, one may take any sale as the minuend and look back for six months for a purchase at less price to match against it. On the other hand, if one is looking for an equation of sale and purchase, one may take the same sale and look forward for six months for any purchase at a lower price. Although obviously no transaction can figure in more than one equation, with that exception we can see no escape from what we have just said. It is true that this means that no director, officer, or 'beneficial owner' may safely buy and sell, or sell and buy, shares of stock in the company except at intervals of six months. Whether that is too drastic a means of meeting the evil, we have not to decide; it is enough that we can find no other way to administer the statute. . . . The crushing liabilities which §16 (b) may impose are apparent from this action in which the judgment was for over $300,000; it should certainly serve as a warning, and may prove a deterrent."

Courts . . . federal stay of state court action . . . federal judge upheld in staying suit for infringement of trademarks pending completion of prior action in state court requesting declaratory judgment that trade-marks have not been infringed.

■ *P. Beiersdorf & Co., Inc.*, v. *McGohey*, C. A. 2d, February 15, 1951, Frank, C. J.

Petitioner was defendant in an action in a state court in which the plaintiff requested a declaratory judgment that plaintiff in that action had not infringed certain registered trade-marks, that it owned these trade-marks, and that a contract between the parties was either invalid or had been completely performed. While this suit was pending, petitioner brought suit in the United States District Court for the Southern District of New York against the plaintiff in the state action for infringement of the trade-marks, breach of contract and for an accounting. The District Court granted a stay of the federal action until completion of the state trial. On petition for leave to file a petition for a writ of mandamus requiring the vacation of the stay order, a majority of the Circuit Court ruled that it might entertain the petition but that it "must decide against petitioner on the merits because of this court's recent decision in *Mottolese* v. *Kaufman*, 176 F. (2d) 301, (C.A.2)." Frank C. J., stated that he disagreed with that decision but felt that he "must be content with hoping that the Supreme Court, recognizing an 'intra-Circuit conflict,' will grant review and reverse this decision, which involves an important problem of federal jurisdiction". Chase, C. J., regarded the *Mottolese* case as correctly decided.

Clark, C. J., dissenting, was of the opinion that the prayer of the petition should be granted. Stating that "Although there is now seemingly some trend toward the breakdown of federal jurisdiction, this case in my understanding goes measurably beyond anything I have seen", he referred to the fact that trade-mark was a field of "normal federal specialties . . . where federal jurisdiction has recently been extended. . .". For this reason, the *Mottolese* case was, in his opinion, distinguishable. That case had involved stockholders' suits in the diversity jurisdiction of the court against directors for mismanagement. "Nine different state suits for the same relief had been started, . . .; these had already been consolidated in the state court. . . . the old equitable principle of bills of peace alone points to a proper reduction or elimination of purely harassing litigation, as the court was at pains to point out." He further stated that the only ground given for the exercise of the judge's discretion was the crowded condition of the docket in the Southern District and he expressed doubt whether this was an adequate ground for denying jurisdiction.

Courts . . . federal interpleader jurisdiction . . . in absence of diversity of citizenship federal district court does not have jurisdiction of employer's interpleader action to determine which of two unions is entitled to union dues checked off under collective bargaining contract, even if federal question is present . . . moreover §301(a) of Labor-Management Relations Act does not give federal district courts jurisdiction over suits for violation of any contracts other than collective bargaining contracts and controversy here is over contract of affiliation between unions.

■ *Sun Shipbuilding & Dry Dock Co.* v. *Industrial Union of Marine and Shipbuilding Workers of America et al.*, U.S.D.C., E.D. Pa., December 28, 1950, Bard, D.J.

Dismissing an interpleader action brought by an employer under the Federal Interpleader Act to determine whether a disaffiliated local union or the national union and its loyal local union were entitled to union dues checked off by the employer pursuant to a collective bargaining contract, the United States District Court for the Eastern District of Pennsylvania ruled that, even if a federal question were present, it did not have jurisdiction of the action in the absence of diversity of citizenship. The Court noted that § 1335 of the Judicial Code requires two or more adverse claimants of diverse citizenship in an interpleader suit, and maintained that if Congress had intended the federal courts to have jurisdiction over an interpleader action based on a federal question without regard to diversity, it would have been a "simple matter"

to have added the requisite words when this section was amended and revised in 1948.

The Court further ruled that the instant action did not involve a federal question within the import of §301 (a) of the Labor-Management Relations Act in that the dispute was over rights under a contract of union affiliation and not over violation of any collective bargaining contract. Section 301 (a), which provides that suits for violation of contracts between an employer and a labor organization, or between labor organizations, may be brought in any federal district court without regard to diversity, was construed as giving federal jurisdiction only over violations of collective bargaining agreements and not over suits for violation of any other type of contract into which a labor union might enter.

Crimes . . . begetting illegitimate child . . . father of child born in Massachusetts but conceived in Rhode Island cannot be punished by Massachusetts under its statute making criminal the begetting of an illegitimate child.

■ *Commonwealth* v. *Lanoue,* Mass. Supreme Judicial Ct., December 6, 1950, Williams, J.

Defendant, a resident and citizen of Rhode Island, was found guilty by the Massachusetts Superior Court on a complaint charging violation of a Massachusetts statute in that "not being her husband [he] did get . . . [the complainant] with child" (G. L. [Ter. Ed.] c. 273, §11). It appeared that the complainant was a Massachusetts resident, and that the child was conceived in Rhode Island and born in Massachusetts. Defendant was found guilty and placed on probation with an order for weekly payments for the support of the child. The question presented on appeal was whether the court had jurisdiction over the alleged offense.

Dismissing the complaint for lack of jurisdiction, the Supreme Court ruled that the begetting must have occurred within the bounds of Massachusetts to be punishable as an offense. The birth of the child there was not deemed an element or part of the offense of begetting but was considered at most only to furnish proof that at some previous time the act in question had been committed. The Court distinguished the offense of begetting from the offense of failing to support an illegitimate child, and pointed out that failure to support may take place in and be punishable by the Massachusetts courts although the begetting was accomplished elsewhere. Accordingly, the cases relied on by the Commonwealth as furnishing jurisdictional precedents in the instant case were rejected in that they concerned the jurisdiction over complaints for nonsupport.

Government Contracts . . . warranties . . . condition that sale of war surplus goods is "as is" appearing on back of contract form, court infers knowledge thereof by purchaser from its prior dealing with Government which consisted of previous offer to purchase pursuant to contract containing in body similar condition . . . specific agreement that sale is "as is" displaces implied warranty that goods will correspond to sample . . . where goods delivered contain matter not conforming to description of what was sold in "as is" contract, contract may be rescinded or purchaser may elect to accept delivery and recover damages for breach of contract.

■ *American Elastics, Inc.* v. *U. S.,* C. A. 2d, February 20, 1951, Chase C. J.

Plaintiff had entered into two contracts to purchase war surplus scrap webbing material from the Government which material upon delivery was found, as to one contract, not to conform to samples sent plaintiff prior to execution of the contract and, as to the second contract, not to be as represented and to contain foreign matter. Rescission of the contracts on the ground of mutual mistake or for breach of warranty and recovery of the price paid was sought in this action.

The first contract had resulted from negotiations initiated by plaintiff which had requested that samples of the scrap be sent it. The samples, unlike the scrap delivered under the contract, were clean, straight and contained no pyroxylin centerpieces and, upon their receipt, plaintiff offered to purchase the material. Before accepting his offer, the Government offered the webbing as "soiled" to eighty-four prospective purchasers excluding plaintiff. Thereafter the parties entered into a contract contained on a printed form which had printed on its back several "conditions", one of which specified that "All property is sold 'as is' and 'where is' without express or implied warranty of any kind." Prior to entering into the contract under consideration, plaintiff had offered to purchase surplus webbing from the Government by entering into a contract which contained in its body a similar condition. This contract never became effective. From that previous offer to purchase, the court below inferred that the plaintiff had knowledge of the condition in the present contract. In affirming this finding, the Court of Appeals quoted with approval the following language of the District Judge: " 'In disposing of war surplus the Government is not engaged in normal trade and frequently is ignorant of the condition of the goods it sells. Buyers have no right to expect, have notice not to expect, and contract not to expect any warranties whatsoever. Plaintiff had such notice from his dealings and so expressly contracted in this transaction.' " The express agreement that there should be no warranty was held to displace the implied warranty that the scrap would correspond to the samples.

In the second contract, plaintiff agreed to purchase and the Government agreed to ship scrap from time to time as it accumulated during the ninety-day life of the contract. Prior to its execution, a Government representative had told plaintiff's president that the scrap was clean and without pyroxylin coated centerpieces. After the arrival of two shipments, both were inspected and the scrap found to be dirty, with pyrox-

ylin coated centerpieces and mixed with much foreign matter. After being so informed, the Government requested that the shipments be set aside for inspection and told plaintiff that the next lot would be as represented. A third shipment was also discovered not to be as represented and the Government informed thereof. Subsequently a fourth shipment arrived. Thereafter the Government offered to allow plaintiff a credit for part of the goods provided plaintiff separated the useless part from the rest. Following this offer, plaintiff paid in full for all the scrap received. A fifth shipment was later received which did not conform and for which plaintiff refused to pay. As in the case of the first contract, the Court held that, because of the contract's terms, plaintiff could not recover its payments because of the soiled condition of the scrap. However, since the shipments under this contract contained a substantial quantity of foreign matter which did not conform to the contractual description of what was sold, the Court was of the opinion that the last shipment under the contract was rightfully rejected and that the preceding ones could have been rejected. But, because of its election to accept the first four shipments, it was held that plaintiff had lost its right to rescind the contract. The Court further held that this acceptance would not bar plaintiff's recovery of damages for breach of contract, but, since plaintiff had not requested recovery upon this ground and since nominal damages for breach of contract are not recoverable against the United States, the dismissal of the claim of the plaintiff below was affirmed.

Judgments . . . attorney and client . . . court may examine merits of suit upon promissory notes given by client to attorney although recovery had been allowed previously upon one of series of which they were part.

■ *Spilker* v. *Hankin*, D. C., C. A., February 23, 1951, Washington, C. J.

The question presented in this case was whether the doctrine of *res judicata* precluded a client from denying liability on five of a series of seven promissory notes made out to her attorney in payment of his fee. All the notes had been executed on the same date. Previously the attorney had recovered judgment upon one of the series of notes. In that action, the client by her pleadings had alleged that relief could not be granted since the contract lacked the element of consent and that the note was voidable since executed under duress. In the case in question, the client again denied the validity of the notes for lack of mutual assent in their execution although alleging that their execution was induced by misrepresentation rather than duress and coercion. After a jury trial, judgment was entered for the client but this was reversed by the Municipal Court of Appeals of the District of Columbia. In reversing that court, the Court of Appeals pointed to the fact that fee contracts between attorney and client were always subject to the close scrutiny of the court whenever judicial enforcement was sought and that this rule, founded in public policy, could not be thwarted or overcome by the execution of a promissory note or a series of such notes. It stated: "The original suit was for a much smaller amount, and some of the issues here in question were only indirectly involved in it. And it is the attorney who seeks further court aid with regard to his fee. The fee arrangement in question was reduced to promissory notes shortly before the termination of the litigation in which the attorney acted for the client, and appears to have been required by the attorney as a condition of his remaining in the case. While we do not mean to imply that an attorney can never protect himself with regard to his fee by making an arrangement of this sort, we consider that when under such circumstances the attorney twice brings the matter into court, the requirements of justice are better served by permitting reexamination of the merits than by treating the prior suit as foreclosing the matter. We think that the client should be permitted to make any legal or equitable defense to the remaining notes which appeals to the conscience of the court."

War . . . veterans . . .. Veterans' Administration regulation basing fees paid to schools training veterans on contracts negotiated with the Administration held valid exercise of Administrator's authority, when school had no "customary cost of tuition", the standard specified in Servicemen's Readjustment Act.

■ *Metropolitan Training Center, Inc.* v. *Gray*, C. A., D. C., February 1, 1951, Bazelon, C. J.

Plaintiff, a trade school teaching watch repairing and jewelry engraving, sued for a declaratory judgment and to enjoin defendant Veterans' Administrator from enforcing a regulation (38 Code Fed. Reg. 1949 Supp. §§21.570, 21.530) basing fees to be paid schools training veterans on contracts negotiated with the Veterans' Administration in accordance with a prescribed formula designed to provide "fair and reasonable compensation", rather than upon the "customary cost of tuition" standard specified in the Servicemen's Readjustment Act. Included within the regulation's scope were those schools in which a majority of the enrollment consisted of veterans and the school either (1) was established after June 22, 1944, or (2) if established prior to that date, had increased its charges to all students after that date to an "unreasonable" amount in relation to the services rendered. Insisting that the Administrator lacked the authority to substitute the "fair and reasonable" compensation standard for the statutory standard, plaintiff pointed to the fact that the "fair and reasonable" standard was prescribed in certain specific contexts in the statute, and hence inferred that such a standard could not be used except where so specified. The Administration contended, on the other hand, that schools such as plaintiff's had no

"customary cost of tuition" and that, since the statute failed to make specific provision for such a contingency, it was proper for him to invoke his general regulatory authority under the Act to prescribe a payment formula.

Affirming the judgment below that the regulation constituted a valid exercise of the Administrator's authority under the Act, the Court ruled that schools established in response to a demand created by the G. I. Bill could have had no "customary cost of tuition" at the time Congress passed the measure, if "customary" were used in the sense of something previously existing and well established. Nor could there be a valid reference, as a measure of fairness, to rates charged to nonveterans since the schools, their curricula and fees were geared primarily to the accommodation of veterans. In schools of this kind, the Court observed, nonveterans were apparently rarities whose fees were more likely to be determined by reference to those charged veterans than the other way around. The Court stated that, without safeguards such as those contained in the regulation, Congress overriding intention to protect the public treasury from overcharges would be defeated. The Court found no merit in the contention that, because the Administrator paid these schools, the amount claimed by them to be their "customary cost of tuition" until June 30, 1948, there was some sort of acquiescence giving rise to a vested right. Nor did it agree with the argument that this regulation resulted in the supervision of state training institutions by the Veterans' Administration.

Witnesses . . . public officers . . . statement of conditions under which investigator of airplane accident for Civil Aeronautics Board may be required to testify to facts observed during course of investigation.

■ *Universal Airline, Inc.* v. *Eastern Air Lines, Inc.*, C. A., D. C., February 23, 1951, Wilkin, D. J.

Among the questions presented by this appeal were those of whether the court below erred in ordering an investigator for the Civil Aeronautics Board to testify in spite of his objection and the regulations of the Board, and whether his testimony as to (1) his observations, (2) his opinions, and (3) reports of the Board was admissible. The Board, as *amicus*, had alleged that it did not object to the investigator having to appear and testify in person to the matters concerning which he had been authorized to testify to by deposition but it was of the opinion that the court should have regarded him as unavailable to appear as a witness because permission for his appearance had not been granted by the Board. It set forth the following reasons for refusing to permit its investigators to appear as witnesses: (1) the sole reason for the investigation is the gaining of information necessary to prevent the recurrence of similar accidents; (2) refusal to release information would encourage frank disclosures; (3) the undesirability of releasing an investigator's conclusions which might differ from the Board's final determination; (4) the conclusions of the investigator would influence the determination of the civil liabilities of the parties involved if testified to in damage suits, contrary to the plain purpose and intent if not the letter of §701 (e) of the Act; and (5) the investigations required the full time of its investigators.

Noting that there was no objection to the personal appearance in court of the investigator and that the Board did not object to his testifying to the facts observed by him, *i.e.*, that portion which was covered in his deposition, the Court held that the action taken below in the instant case was not erroneous. It stated, however, that, as a matter of comity, under circumstances such as those presented in the instant case, the trial court should ordinarily receive the deposition of the investigator, rather than order his personal attendance. It added that in a case where the CAB investigator is the sole source of evidence reasonably available to the parties, with regard to the precise position and condition of aircraft after a disaster, it was incumbent upon the Civil Aeronautics Authority to make his testimony available by deposition or in person.

The Court agreed with the Board's contention that it was error to compel an agent of the Board to produce any of the Board's reports, orders, or private files or to testify as to the contents of such private papers. It also held inadmissible the conclusions or opinions of the Board and any testimony reflecting directly or indirectly the ultimate views or findings of the Board.

Further Proceedings in Cases Reported in This Division.

■ The following action has been taken in the Supreme Court of the United States:

CERTIORARI GRANTED, February 26, 1951: *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm.*—Commerce (36 A.B.A.J. 1027, December, 1950).

CERTIORARI GRANTED, March 12, 1951: *Doremus et al.* v. *Board of Education of Borough of Hawthorne et al.*—Constitutional Law (36 A.B.A.J. 1028, December, 1950).

PROBABLE JURISDICTION NOTED, March 5, 1951: *Radio Corp. of America et al.* v. *U. S. et al.*—Radio Communication (36 A.B.A.J. 1030, December, 1950; 37 A.B.A.J. 64, 150, January, February, 1951).

CERTIORARI DENIED, February 26, 1951: *Carroll et al.* v. *Allen B. Dumont Laboratories, Inc., et al.*—Radio Communication (36 A.B.A.J. 59, 937, January, November, 1950).

CERTIORARI DENIED, March 6, 1951: *Sparks* v. *Civil Aeronautics Board*—Arbitration (36 A.B.A.J. 854, October, 1950).

CERTIORARI DENIED, March 12, 1951: *Hiss* v. *U. S.*—*Evidence* (36 A.B.A.J. 222, March, 1950; 37 A.B.A.J. 68, January, 1951).

Nominating Petitions

Connecticut

■ The undersigned hereby nominate Charles W. Pettengill, of Greenwich, for the office of State Delegate for and from the State of Connecticut to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

David S. Day and P. C. Calhoun, of Bridgeport;

Joseph F. Berry, Cyril Coleman, William E. C. Bulkeley, Allan K. Smith, James W. Carpenter, Lucius F. Robinson, Jr., William W. Fisher, Ernest W. McCormick, Pomeroy Day, Robert L. Halloran, DeLancey Pelgrift, Frederick J. Rundbaken, Valentine J. Sacco, J. Ronald Regnier, George Muir, Hugh Meade Alcorn, Jr., Joseph M. Freedman, Paul Volpe, James D. Cosgrove, Reuben Sudarsky, M. J. Blumenfeld and Jacob Berman, of Hartford;

Leo V. Gaffney, of New Britain.

Florida

■ The undersigned hereby nominate E. Dixie Beggs, of Pensacola, to fill the vacancy in the office of State Delegate for and from the State of Florida:

G. B. Knowles and W. J. Daniel, of Bradenton;

Scott M. Loftin, Harold B. Wahl, Russell L. Frink, J. Turner Butler, Donald K. Carroll, Wayne K. Ramsay, Fred B. Noble, Francis P. Conroy II, Sam R. Marks and Harry T. Gray, of Jacksonville;

William L. Gray, Jr., A. M. Franklin, R. B. Cole, M. L. Mershon, John H. Wahl, Jr., Robert L. Casey, C. Clyde Atkins, N. Vernon Hawthorne, Jack A. Abbott, Stanley Milledge, Norman C. Hendry, Vincent C. Giblin and W. H. Walker, Jr., of Miami.

Illinois

■ The undersigned hereby nominate John Alan Appleman, of Urbana, for the office of State Delegate for and from the State of Illinois to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

R. F. Dobbins, James Edwin Filson, August C. Meyer, Donald M. Reno, Alfred F. Conard and Kenneth S. Carlston, of Champaign;

George C. Bunge, Robert C. Vogel, L. H. Vogel, Paul E. Price, William H. Leigh, Louis F. Cainkar and David Jacker, of Chicago;

William M. Acton and Oliver D. Mann, of Danville;

Burton P. Sears, of Evanston;

DeWitt Twente, of Harrisburg;

Harry Dale Morgan, London G. Middleton, Michael O. Gard, John D. Thomason, Donald G. Beste and Donald A. Morgan, of Peoria;

Russell N. Sullivan and John E. Cribbet, of Urbana.

Iowa

■ The undersigned hereby nominate John R. Randall, of Cedar Rapids, for the office of State Delegate for and from the State of Iowa, to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

John Carlisle Pryor, of Burlington;

David G. Bleakley, Charles A. Hastings, T. M. Ingersoll and B. L. Sifford, of Cedar Rapids.

E. C. Halbach, of Clinton;

Wayne G. Cook and Edward A. Doerr, of Davenport;

Frederic M. Miller, W. B. Hurlbert, A. B. Howland, Fred D. Huebner and Edward H. Jones, of Des Moines;

Robert W. Clewell, of Dubuque;

Burt J. Thompson, of Forest City;

Ingalls Swisher, William R. Hart and Mason Ladd, of Iowa City;

R. F. Clough and John A. Senneff, of Mason City;

E. W. McNeil, of Montezuma;

E. P. Donohue, of New Hampton;

Henry J. TePaske, of Orange City;

Clyde E. Jones and Wilbur R. Dull, of Ottumwa.

Maine

■ The undersigned hereby nominate Clement F. Robinson, of Brunswick, for the office of State Delegate for and from the State of Maine to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

Harold H. Murchie, of Calais;

Clarence H. Crosby and Owen Brewster, of Dexter;

Currier C. Holman, of Farmington;

William B. Skelton, John J. Mahon and Frank M. Coffin, of Lewiston;

Albert J. Stearns and Frank W. Bjorklund, of Norway;

Jacob H. Berman, Sidney W. Wernick, Edward J. Berman, Josiah H. Drummond, Leon V. Walker, John F. Dana, Edward T. Gignoux, Edward F. Dana, H. M. Verrill, Brooks Whitehouse, Robinson Verrill, William S. Linnell, Sidney W. Thaxter, Porter Thompson, Leonard A. Pierce and Charles L. Hutchinson, of Portland.

Montana

■ The undersigned hereby nominate Julius J. Wuerthner, of Great Falls, for the office of State Delegate for and from the State of Montana to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

A. F. Lamey, Cale Crowley, H. J. Coleman, James H. Kilbourne, Melvin N. Hoiness, George J. Hutton, Franklin S. Longan, R. E. Cooke, George E. Snell and Henry A. Chapple, of Billings;

E. A. Blenker, of Columbus;

H. R. Eickemeyer, Randall Swanberg, LaRue Smith, Jr., O. B. Kotz, Truman G. Bradford, Orin R. Cure, Arthur S. Jardine, Alex Blewett, Jr., John D. Stephenson, R. F. Clary, Jr., James R. Paul, Edward C. Alexander, Charles N. Pray and H. B. Hoffman, of Great Falls.

Oklahoma

■ The undersigned hereby nominate Howard L. Smith, of Tulsa, for the office of State Delegate for and from the State of Oklahoma to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

Villard Martin, Richard H. Wills, Sr., Forrest M. Darrough, Joseph L.

Hull, John M. Wheeler, Sr., C. Lawrence Elder, Claude H. Rosenstein, Russell G. Lowe, and Chris L. Rhodes, of Tulsa;

D. I. Johnston, Streeter B. Flynn, Byrne A. Bowman, George Miskovsky, John D. Cheek, and John H. Cantrell, of Oklahoma City;

Walter J. Arnote and A. James Gordon, of McAlester;

James D. Gibson, of Muskogee;

Douglas C. McKeever and Frank Carter, of Enid;

Frank T. McCloy and John T. Craig, of Pawhuska;

Edwin R. McNeill, of Pawnee;

Thomas L. Blakemore, of Sapulpa;

Ray McNaughton, of Miami.

Wyoming

■ The undersigned hereby nominate H. Glenn Kinsley, of Sheridan, for the office of State Delegate for and from the State of Wyoming to be elected in 1951 for a three-year term beginning at the adjournment of the 1951 Annual Meeting:

W. J. Wehrli, Houston G. Williams, William F. Swanton, H. B. Durham, R. H. Nichols, C. M. Crowell, William H. Brown, Jr., Donald E. Chapin and D. W. Ogilbee, of Casper;

James A. Greenwood, John S. Miller, M. S. Reynolds, Arthur Kline, M. A. Kline, Vincent Mulvaney, Edward T. Lazear, John U. Loomis, Walter B. Phelan, C. A. Swainson, Ray E. Lee, Carleton A. Lathrop and John C. Pickett, of Cheyenne;

Alfred M. Pence, of Laramie;

D. P. B. Marshall and William D. Redle, of Sheridan.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ Arthur Van Doorn Chamberlain was elected President of the New York State Bar Association at its annual meeting in January. Chester Wood was re-elected Secretary and Robert C. Poskanzer Treasurer.

The Association rejected a resolution calling on lawyers to make periodic loyalty oaths. A feature of the meeting was a debate on the Internal Security Act.

■ The Judge Advocates Association, a national, legal society and an affiliated organization of the American Bar Association, has extended an invitation to all lawyers who are serving or who have served in the Army, Navy or Air Force, and particularly those who have served in the Judge Advocate General's Corps of the Army, the Office of the Judge Advocate General of the Navy and the Judge Advocate General's Department of the Air Force, to make application for membership in the Judge Advocates Association. The Association, organized in Washington, D. C., as a nonprofit corporation, is devoted to the development of military law and an efficient military legal and judicial system.

Requests for information and applications for membership may be directed to the Executive Secretary, Major Richard H. Love, JAGC-USAR, Suite 312, Denrike Building, Washington 5, D. C.

■ The Bar Association of Erie County, New York, has arranged, through the New York State Division of Veterans Affairs, to distribute to new members of the Armed Forces a pamphlet calling attention to certain benefits and privileges which it is important to protect. Forms are provided with the pamphlet. One form provides a notification to an employer of claims for re-employment rights and vacation or bonus benefits. A second form for the notification of creditors and a request for an equitable adjustment on obligations is enclosed.

■ The Boston Bar Association has inaugurated a Lawyers' Reference Service. The referral panel includes more than four hundred lawyers who have applied for listing.

■ Following the close of the Mid-Winter meeting of the House of Delegates in Chicago, the Colorado Bar Association was host to bar representatives of eleven western states which make up the Interstate Bar Council. The Council has for its purpose the promotion and exchange of ideas on Bar programs relating to the improvement of the legal profession in the area. The meeting took place at the Brown Palace Hotel in Denver and was devoted to panel discussions on public relations, legal education, and continuing legal education.

■ A briefing service for lawyers in Kentucky is furnished by the Law School of the University of Louisville. Organized in 1931, the Briefing Service has two objects. One is to give the law students practical training in brief writing and the second is to make available the research facilities of the law school to practicing lawyers. Junior and senior students participate and work under the supervision of a faculty adviser. All work done by the service is free of charge.

■ The Wayne University Law School has completed its first year's program of specialized courses for practicing lawyers. Classes are restricted in size to the seminar level and the curriculum is confined to subjects dealing with taxation, labor law and corporate and finance law. Work can be taken toward a master of laws degree, or restricted to the courses which the student elects.

Books for Lawyers
(Continued from page 281)

SOCIAL THOUGHT IN AMERICA: *The Revolt against Formalism. By Morton G. White. New York: The Viking Press. 1949. $3.50. Pages 260.*

EVOLUTION AND THE FOUNDERS OF PRAGMATISM. *By Philip A. Wiener. Introduction by John Dewey. Cambridge: Harvard University Press. 1949. $5.00. Pages 288.*

THE AMERICAN MIND: *An Interpretation of American Thought and Character Since the 1880's. By Henry Steele Commager. New Haven: Yale University Press. 1950. $5.00. Pages 476.*

THE POSITIVISM OF MR. JUSTICE HOLMES. *By Mark De Wolfe Howe. Measure, Spring. 1950. Vol. I., No. 2. Pages 118-132.*

Two professors of philosophy, one of history and one of law have felt the advent of midcentury as fit occasion to cast a critical glance over the past five or more decades in order to appraise backgrounds and appreciate trends. It is interesting for us to notice what they have to say about the law and particularly of the increasingly controversial figure of the late Mr. Justice Holmes.

Professor White of Harvard, formerly of Columbia and Pennsylvania, finds the evidence for his subtitle, "The Revolt against Formalism", principally in the works of Dewey, Holmes, Veblen, Beard and Robinson, whose works he traces up to the '20's. He claims the depression in the '30's broke the influence of the movement heralded by these thinkers and brought in new problems and new solutions from presumably new thinkers. "What I have attempted here is a preface to that as yet unfinished story." We hope that when he tells that story, he will find that the five thinkers, here treated, remained a potent influence and did not taper off in significance as he implies.

The five writers represent a new psychology, ethics, education, economics, history, philosophy and, as exemplified by Holmes, a new jurisprudence. Says White, ". . . it is questionable whether the concern with prediction of itself makes Holmes a pragmatist. It is important to insist, however, that the closeness of Pierce, James and Holmes in their youth as well as the 'practical' character of Holmes' definition of the law suggests a very strong cultural and intellectual tie between our most distinctive philosophy and our most distinctive philosophy of law." He then treats the disputes in interpreting Holmes' view on the relationship between law and ethics and some questions as to the consistency of the Lochner dissent. The discussion of the World War I. decisions is ably summarized: "In addition to applying the doctrine of clear and present danger and urging that it was necessary to prove that the defendants had an actual intent to obstruct the war effort, Holmes announced a semiphilosophical conviction which endeared him to the generation that had learned its philosophy from John Dewey. For in the Abrams dissent, he described the Constitution as an experiment, indeed he described all life as an experiment. He also associated himself with the doctrine which the pragmatists called 'fallibilism' when he said that 'time has upset many fighting faiths.' In his plea for 'free trade in ideas' he contributed another compelling metaphor to American prose, a metaphor which expressed his attitude toward free speech, as James' search for the 'cash value' of ideas delineated his pragmatism." Next the author considers some difficulties in the naturalistic positions of Veblen, Holmes and Dewey. He concludes that the thinkers here have "an appreciable though diminished influence on our thinking" and that they represent "a memorable movement in American social thought". Particularly as to Holmes in jurisprudence and Dewey in philosophy, we question the diminished influence.

Professor Wiener, of the College of the City of New York, has written a solid, readable and significant outline of the evolutionary background of the founders of pragmatism, among whom he lists as members of the interesting Metaphysical Club which met at Harvard in the '70's, Nicholas St. John Green, the "American Bentham" who should be better known by lawyers, and Oliver Wendell Holmes, Jr. Of the latter, Professor Wiener says, "Unless we pedantically and unhistorically reserve the ancient name 'philosopher' for system-builders or academic professors of philosophy, Oliver Wendell Holmes, Jr. is certainly a philosopher in his own right. Many a tribute has been paid to his philosophical addresses and writings by those who knew and admired him as a lawyer and judge deeply concerned about the larger ramifications of his calling. His correspondence with professional philosophers, William James, Max C. Otto, and Morris R. Cohen, as well as with legal scholars, Sir Frederick Pollock, Harold J. Laski and others, leaves no doubt that he sought and formulated for himself answers to the perennial questions of philosophy. . . ." Wiener questions to some extent the consistency of Holmes' pragmatism. "He oscillates with equally brilliant eloquence at both extremes between an individualist, subjective theory and a social, objective one." He concludes, in contradistinction to White, that "If American philosophy is to continue to be a significant cultural force in the world, it will have to draw on its pragmatic legacy."

Since the masterpiece of the Beards, "The Rise of American Civilization", we have had no such vibrant picture nor so broad a sweep of our country's history, as we now have in Commager's *The American Mind*. Here, with a basic emphasis on the pragmatic, we read the story of our literature, art, economics, religion, philosophy, history, politics and law since the 1880's. Two chapters treat of the law, the first on its evolution in this country, the place of natural law theory, the literature

of the law and the erupting conflict against mechanical jurisprudence, a topic leading to the subject matter of the second chapter on "The Masters of the New Jurisprudence: Pound and Holmes". Holmes is pictured as leading the van, a generation ahead of his time, with significant echoes in the works of James B. Thayer, John C. Gray, Joseph H. Beale, Ernst Freund and, above all, Roscoe Pound. Comminger will no doubt invite some dissenters, but most will agree with the aptness of his characterization of Holmes as "the most distinguished mind" of his time,—a fitting tribute in a work on *The American Mind.*

The last of the four works here considered is based upon a lecture delivered by Harvard's law professor, Howe, at Buffalo University. It is printed in a new magazine, *Measure*, which bids fair to be significant if it maintains the standard exhibited by this second number. With a wealth of Holmes material at his command and the work he is doing on the forthcoming biography of the late Justice as a background. Professor Howe ably attacks such writers as his colleague, Professor Lon Fuller, who cavil at what they allege is the wide cleavage in Holmes' theory between law and morality. Fuller and the theologically minded natural law revivalists mentioned by Howe might have been met squarely on that issue, but Professor Howe prefers to argue, and succeeds ably in sustaining the view that the justice derived from his father and amply maintained in his own right, a moral emphasis that belies his critics.

These four midcentury appraisals indicate that we are rapidly approaching the definitive view of Holmes. The Holmes appreciators—not without critical acumen—are rallying to the cause in the face of the depreciators of recent years. The test for this issue—as for so many in the law—is the writer's attitude toward natural law.

LESTER E. DENONN

New York, New York

Regional Convention

(Continued from page 265)

From the time the registration desk was opened at Convention headquarters on Wednesday afternoon, the Convention moved forward in high gear and with a spirit unparalleled in the history of the Association.

An outline of the program and a list of the Convention committees are given below to acquaint the profession with the character and scope of the meeting and possibly to serve as a model for like meetings in other parts of the country.

Wednesday, March 7
3 to 8 P. M.
REGISTRATION
8 to 11 P. M.
STAG SMOKER
Compliments of Atlanta Bar Association
Thursday, March 8
9:30 A. M.
ASSEMBLY: Convention called to order.
E. Smythe Gambrell, General Chairman Presiding
Invocation, Dr. Monroe F. Swilley, Pastor, Second-Ponce de Leon Baptist Church, Atlanta, Georgia.
Welcome:
Herman E. Talmadge, Governor of Georgia
William B. Hartsfield, Mayor of Atlanta
A. Edward Smith, President, Georgia Bar Association
A. C. Latimer, President, Atlanta Bar Association
Response:
Cody Fowler, President, American Bar Association
Burt J. Thompson, Chairman, American Bar Association's Committee on Regional Conventions
Introduction of Distinguished Guests
Announcements
10 A. M.
Public Relations of the Legal Profession
"The Lawyers' Relation to Freedom", W. H. Duckworth, Chief Justice of Georgia.
"The Threat of Socialization", Robert G. Storey, Board of Governors of American Bar Association
"The American Bar Association", Cody Fowler, President, American Bar Association
12 M.
GENERAL LUNCHEON
William Logan Martin, Toastmaster
"Our Heritage and Responsibility", Gordon Browning, Governor of Tennessee
12:30 P. M.
LUNCHEON AND FASHION SHOW FOR VISITING LADIES
Under direction of Ladies' Entertainment Committee
2 to 5 P. M.
ASSEMBLY: WORKSHOP COURSES
Herbert F. Goodrich, Court of Appeals, Third Circuit; Secretary of American Law Institute's Committee on Continuing Legal Education, Philadelphia, Moderator
LAW OFFICE MANAGEMENT
Reginald Heber Smith, Director of Survey of the Legal Profession, Boston, Massachusetts
Israel Smith, Tyler, Texas
LEGAL DRAFTSMANSHIP
"General Principles", Alan Loth, Fort Dodge, Iowa
"Corporate Instruments", Kurt F. Pantzer, Indianapolis, Indiana
TAXATION FOR NON-SPECIALISTS
"What the General Practitioner Should Know", T. N. Tarleau, New York, New York
5:30 P. M.
Cocktail Party for Convention Lawyers and Their Ladies
Compliments of the Lawyers Club of Atlanta
Friday, March 9
8 A. M.
AMERICAN JUDICATURE SOCIETY BREAKFAST
Addresses:
George E. Brand, President
Glenn R. Winters, Secretary
9 to 11:30 A. M.
WORKSHOP COURSES
LAW OFFICE MANAGEMENT
Israel Smith, Tyler, Texas
Paul Carrington, Dallas, Texas
LEGAL DRAFTSMANSHIP
"General Principles", Alan Loth, Fort Dodge, Iowa
"Corporate Instruments", Kurt F. Pantzer, Indianapolis, Indiana
TAXATION
"Procedure Before Bureau", Edgar J. Goodrich, Washington, D. C.
"How to Build a Tax Practice", John E. McClure, Washington, D. C.
12 M.
LAW SCHOOL LUNCHEON
2 to 5 P.M.
ASSEMBLY: WORLD PROBLEMS
Harold J. Gallagher, Former President of American Bar Association, New York, New York, Moderator
"The Call to World Leadership" John J. Parker, Senior Judge, Court of Appeals, Fourth Circuit, Charlotte, North Carolina
"The Relationship of International Development to Security", Nelson A. Rockefeller, Chairman of International Development Advisory Board, New York, New York
"The Responsibility of the Bar in a Time of Crisis for Putting Its House in Order", Arthur T. Vanderbilt, Chief Justice of New Jersey, Former President of American Bar Association, Newark, New Jersey
RESOLUTIONS
2:30 to 5 P. M.
LADIES MOTOR TOUR TO POINTS OF INTEREST
Under direction Ladies' Entertainment Committee

6:30 P. M.

CONVENTION BANQUET

President Fowler, Presiding

Robert B. Troutman, Toastmaster

Address: Harold E. Stassen, Philadelphia, Pennsylvania

Saturday, March 10

8:00 A. M.

INSURANCE SECTION BREAKFAST

E. Smythe Gambrell, Presiding

Short Addresses by John M. Slaton and Abit Nix

9:30 A. M. to 12:30 P. M.

SECTION MEETINGS

1—ADMINISTRATIVE LAW

Presiding: Joseph B. Brennan, Atlanta, Georgia

"The Proposed Administrative Practitioners Act", Edwin G. Barham, Valdosta, Georgia

"An Appraisal of Federal Administrative Procedure Today", Professor Maurice S. Culp, Emory University, Georgia

"State Administrative Law" Professor D. M. Feild, Athens, Georgia

2—CONFERENCE OF BAR PRESIDENTS AND SECTION OF BAR ACTIVITIES

Presiding: Charles W. Pettengill, Greenwich, Connecticut

Discussion Leaders:

Richard H. Hunt, Miami, Florida
Edward H. Jones, Des Moines, Iowa
J. H. Doughty, Knoxville, Tennessee
Francis J. Heazel, Asheville, North Carolina
John A. Lusk, Jr., Gadsden, Alabama
Frank A. McLeod, Sumter, South Carolina
Armistead W. Sapp, Greensboro, North Carolina
A. Edward Smith, Columbus, Georgia
John T. Wigginton, Tallahassee, Florida
Gibson B. Witherspoon, Meridian, Mississippi

A. "What is Expected of State and Local Bar Organizations?"

1. Public Service
   a. Attention to American Citizenship
   b. Law Reform
   c. Legal Aid
   d. Legal Ethics
2. Service to Members
   a. Legislation
   b. Public Relations
   c. Continuing Legal Education
   d. Curbing of Unauthorized Practice

B. "The Integrated Bar and the Voluntary Bar—A Comparative Consideration."

3—CRIMINAL LAW (WORKSHOP ON PROBATION)

Presiding Judges:

Frank Hooper . . . U. S. District Judge Atlanta, Georgia
Seybourn H. Lynne U. S. District Judge Birmingham, Alabama
T. B. Greneker . . . State Circuit Judge Edgefield, South Carolina

Probation Officers Reporting:

Joe B. Martin . Chief Probation Officer Atlanta, Georgia
William E. Davidson, Jr. . . . .Federal Probation Officer, Gainesville, Georgia
L. B. Stephens . Administrative Assistant, Board of Pardons and Paroles, Montgomery, Alabama
Roy W. Russell . Administrative Assistant, Florida Parole Commission, Tallahassee, Florida

Others Participating:

James V. Bennett . . Director, Bureau of Prisons, Washington, D. C.
John Hill . . . . . U. S. Attorney Birmingham, Alabama
Richard A. Chappell . Chief of Federal Probation, Washington, D. C.

4—INSURANCE LAW

Presiding: W. Percy McDonald, Memphis, Tennessee

"Income and Estate Tax Problems in Life Insurance", Herbert R. Elsas, Atlanta, Georgia

"The Preparation and Trial of Negligence Cases", Clarence W. Heyl, Peoria, Illinois

"Admissibility of Findings of Civil Aeronautics Board in Negligence Cases", George A. Smith, Atlanta, Georgia

5—JUDICIAL ADMINISTRATION

Presiding: John J. Parker, Charlotte, North Carolina

Opening Statement by the Chairman Regarding Minimum Standards of Judicial Administration.

Report on Program

Paul B. Dewitt, New York, New York
Leland Tolman, Washington, D. C.

Discussion Leaders:

Fred B. Helms, Charlotte, North Carolina
Jesse W. Boyd, Spartanburg, South Carolina
John B. Harris, Macon, Georgia
Paul E. Raymond, Daytona Beach, Florida
Devane K. Jones, Tuscaloosa, Alabama
Phil Stone, Oxford, Mississippi
John E. Swepston, Memphis, Tennessee
Robert L. Russell, Winder, Georgia
W. H. Duckworth, Atlanta, Georgia
I. H. Sutton, Atlanta, Georgia
Virlyn B. Moore, Atlanta, Georgia
Ralph H. Pharr, Atlanta, Georgia
Quincy O. Arnold, Atlanta, Georgia

6—JUNIOR BAR CONFERENCE

Presiding: C. Baxter Jones, Jr., Atlanta, Georgia

"The J. B. C. National Program in General", Charles H. Burton, Washington, D. C.

"The J. B. C. Committee System and Functions", Paul W. Lashly, St. Louis, Missouri

"The J. B. C. Activities Committee", Lewis R. Donelson, III, Memphis, Tennessee

"The J. B. C. Membership Program", G. Gregg Everngam, Silver Spring, Maryland

"The J. B. C. Law Student Program", Bernard W. Chill, Jackson, Mississippi

"The J. B. C. Public Information Program (including television)", Ben Paul Noble, Washington, D. C.

"Courts of Limited Jurisdiction", T. G. Greaves, Jr., Mobile, Alabama

"Fourth Circuit Summary", William F. Womble, Winston-Salem, North Carolina

"Fifth Circuit Summary", C. Baxter Jones, Jr., Atlanta, Georgia

7—LABOR RELATIONS LAW

Presiding: Warren E. Hall, Atlanta, Georgia

"Recent Significant Judicial Decisions", Jerome A. Cooper, Birmingham, Alabama

"Legal Problems Arising under the Railway Labor Act", W. Glen Harlan, Atlanta, Georgia

"Technique of Practice before the National Labor Relations Board", William E. Mitch, Birmingham, Alabama

"Welfare and Pension Plans in Collective Bargaining Agreements", William B. Spann, Jr, Atlanta, Georgia

"Collective Bargaining in a Defense Production Economy", Alexander E. Wilson, Jr., Atlanta, Georgia

Round Table Discussion of Current Problems in Labor Law

8—MUNICIPAL LAW

Presiding: Giles J. Patterson, Jacksonville, Florida

"Recent Developments in Revenue Bond Financing", William A. Rose, Birmingham, Alabama

"Revenue Bond Remedies", Huger Sinkler, Charleston, South Carolina

"Legal Research Aids to Local Governments", Porter C. Greenwood, Knoxville, Tennessee

General Discussion

9—REAL PROPERTY, PROBATE AND TRUST LAW

Presiding: James N. Frazer and James C. Shelor, Atlanta, Georgia

"Marital Deductions in the Planning of Estates", Thomas S. Edmonds, Chicago, Illinois

"Charitable Organizations and Trusts Engaged in Business", Lee C. Bradley, Jr., Birmingham, Alabama

10—TAXATION

Presiding: Morton P. Fisher, Baltimore, Maryland

10:00 A. M. —Committee Reports: Discussion of developments in and studies being made for proposals for changes in federal income, gift and estate taxes.

10:30 A. M. — Discussion of 1950 Excess Profits Tax

Merle Miller, Indianapolis, Indiana
Jacquin D. Bierman, New York, New York
Eugene G. Bogan, Bureau of Internal Revenue, Washington, D. C.

12:45 P. M.—Luncheon

Allan H. W. Higgins, Presiding, Boston, Massachusetts

"Tax Legislation Sponsored by the ABA" H. Cecil Kilpatrick, Washington, D. C.

2:15 P. M.—Weston Vernon, Presiding Panel Discussion:

"Tax Changes under the 1950 Revenue Act"

Panel:

"Changes Affecting Estates and Trusts", David Richmond, Washington, D. C.
"Changes Affecting Corporations". James S. Y. Ivins, Washington, D. C.
"Changes Affecting Individuals", William A. Sutherland, Washington, D. C.

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Section of Municipal Law Inaugurates New Publication

■ Volume 1, Number 1, of the *Municipal Law Service Letter,* January, 1951, has been distributed by the Section of Municipal Law. Its editor, Dean Jefferson B. Fordham, College of Law, Ohio State University, who is chairman of the Section, has made interesting and valuable comment upon several important new cases. In his introductory paragraph he says:

> In keeping with action taken at the annual meeting of the Section of Municipal Law of the American Bar Association in September, 1950, the Section officers are pleased to distribute to the membership this initial number of the "Muncipal Law Service Letter". The Letter will appear each calendar month except July and August. Its physical make-up is designed to facilitate simple and convenient filing in a loose-leaf type binder.
>
> True to its name the general purpose of the Letter is to be of service to the members in keeping abreast of developments in the field of the Section's interest. Comprehensive coverage in so brief a publication is obviously out of the question. The primary object is to give the members at least a lead to some of the significant constitutional, statutory, administrative and judicial developments in the domain of Local Government Law. The Letter will serve, in the second place, as a medium of communication with the members. While we are not rigidly committed to any particular plan as to the contents of the Letter, the working scheme envisages (1) a brief analytical comment on a topic of great current interest and usually within the field of a Section committee, (2) notes on a number of significant recent decisions (3) a selected bibliography keyed to the comment and (4) a Section news department. In this introductory Letter there is not space for a bibliography.

Department of Legislation

Harry W. Jones, Editor-in-Charge

The Presidential Powers Issue in the "Great Debate"

■ The "Great Debate" over the sending of United States troops to Western Europe involves substantive issues of military strategy and foreign policy that are beyond the province and competence of this department of the JOURNAL. But the course of the "Great Debate" during the first two months of 1951 has been such as to raise again that hardiest perennial among constitutional questions, the authority of the President, acting independently of Congress, to commit American servicemen to foreign duty.

The constitutional issue is one which has never been settled by the Supreme Court and which, by its nature, is unlikely to come before the Court in a form requiring complete and conclusive determination. Such guidance as there is must be sought in political, rather than judicial, precedents. The controversy set off early in the first session of the 82d Congress by President Truman's informal but bold assertion of broad presidential prerogative as Commander in Chief of the Army and Navy, and by Senator Wherry's introduction of Senate Resolution 8, will certainly provide a political precedent of importance in power contests between future Congresses and future Presidents. A brief account of the early legislative history of the Wherry Resolution is offered here as indicative of the manner in which constitutional issues are raised and shaped in the congressional forum.

The Wherry Resolution, introduced by the Minority Leader on January 8, provided, in full, as follows:

> RESOLVED, That it is the sense of the Senate that no ground forces of the United States should be assigned to duty in the European area for the purposes of the North Atlantic Treaty pending the formulation of a policy with respect thereto by the Congress.

The Resolution reached the floor of the Senate, by a unanimous consent agreement, on January 16. At the outset of the Senate's consideration of the Resolution, Senator Wherry modified it by substituting the word *"adoption"* for the word *"formulation"* in the last clause. Thus the resolution, as modified, called for a Senate declaration of policy that the President should not send ground troops abroad to European area for the purposes of the North Atlantic Treaty without prior and formal authorization from Congress. Concern was immediately expressed by Senator Lehman that a requirement of prior passage by Congress of an act or joint resolution authorizing the President to commit troops to Western Europe might put it within the power of a determined Senate minority to block necessary emergency action by use of the filibuster.

In his explanatory statement, Senator Wherry made two efforts to narrow the area of debate with respect to his resolution. *First,* the Minority Leader disclaimed any intention to start a prolonged theoretical discussion on the general issue of inherent presidential power over the use of the Armed Forces. Senator Wherry's position on the elusive constitutional question is best indicated by an extract from his remarks:

> I simply want the Senate to go on record as saying that it is the sense of the Senate that *whether the President has the constitutional authority he says he has, or does not have it,* we want no commitments made until the Congress determines whether under the provisions of the North Atlantic Treaty we shall furnish ground forces to an integrated army in Europe. [Italics supplied.]

Second, Senator Wherry sought to separate the issue on the merits—whether troops should be sent to Europe as a matter of substantive foreign policy—from the question whether the decision to send troops should be made by the President, by Congress, or jointly by the President and Congress. According to Senator Wherry, his resolution was concerned exclusively with the second question, and a vote for it would in no way constitute a prejudgment of the troops-to-Europe issue on the merits.

The Wherry Resolution was discussed on the Senate floor on January 16, 17, 22 and 23. On January 23 action was taken, again by unanimous consent, to refer the Resolution to two Senate committees, the Committee on Armed Services and the Committee on Foreign Relations.

The joint hearings of the Committee on Armed Services and the Committee on Foreign Relations furnished a sounding board for the expression of widely differing views on the military aspects of United States' foreign policy. In spite of Senator Wherry's earlier insistence that his resolution was not designed to test the merits of the troops-to-Europe issue, by far the greater part of the testimony at the joint hearings was directed to that, substantive, issue. It seems clear from the record that the Administration's witnesses had been instructed to avoid, or at least to soft-pedal, the presidential powers question. There was no strong assertion of the President's constitutional prerogative by the Cabinet members and high-ranking military officers who appeared in opposition to the Wherry Resolution, although all of them urged that the President, as a matter of practical policy, should be left unencumbered by statutory restrictions and free to take such action with respect to the use of troops in Western Europe as may be required by unforeseen developments.

Four leaders of the Republican Party appeared at the joint hearings, Governor Dewey and former Governor Stassen in opposition to the Wherry Resolution and former President Hoover and Senator Taft in general support of the Resolution. To the extent that they addressed themselves to the question of the respective roles of the President and

Congress, Mr. Hoover and Senator Taft were sharply critical of claims that the President, as a matter of constitutional prerogative, has the power in himself to send troops to Western Europe. Mr. Hoover stated it as his strong conviction that Congress should pass in advance on any substantial commitment of troops to Western Europe and observed tartly that "until 1940" every President had thought that he should not use American forces overseas on his own initiative except in situations involving "immediate danger to American life and property".

Mr. Stassen and Governor Dewey, although agreed in opposition to the Wherry Resolution, differed significantly on the power question. Mr. Stassen opposed the Resolution not only as bad policy but also on the ground that a congressional restriction on the President's "deployment" of troops would be unconstitutional. Governor Dewey, by contrast, made it clear at the beginning of his testimony that his opposition to the Wherry Resolution was not upon any ground of lack of constitutional power. The following quotation from the Dewey statement has added interest as an expression of views by an able lawyer who has certainly not been without occasion to reflect on the subject of the constitutional powers associated with the Presidency:

> This resolution is the culmination of a debate which has occurred periodically throughout American history. It is interesting historically that the power has been exercised by various Presidents over a period of the last 147 years . . . . Despite this imposing array of historic opposition to the resolution before you, let me say immediately that I believe the Congress probably has power by act or by resolution to forbid the use of our armed forces anywhere. The power to raise troops and to withhold or grant funds for their support carries within it the power to withhold approval of their use.

At this writing, it appears that the joint hearings of the Committee on Armed Services and Committee on Foreign Relations will end on March 2 or 3 and that the committees will report back, as a substitute for the Wherry Resolution, a resolution along the lines of the one drafted by Chairman Connally of the Foreign Relations Committee and Chairman Russell of the Armed Services Committee. The Connally-Russell Resolution, made public February 25, strongly endorses the common defense effort provided for by the North Atlantic Treaty, expresses approval of the designation of General Eisenhower as Supreme Allied Commander in Europe, and states it as the belief of the Senate that the existing world crisis "makes it necessary for the United States to station abroad such units of our armed forces as may be necessary and appropriate to contribute our fair share of the forces needed for the joint defense of the North Atlantic area". On the matter of President-Congress relations, the Connally-Russell substitute resolution contains two significant compromise provisions (1) That it is the sense of the Senate "that the President of the United States, as Commander in Chief of the Armed Forces, *in taking action* to send additional units of ground troops to Europe . . . *will consult*", among others, the Senate Committee on Foreign Relations, the House Committee on Foreign Affairs, and the Senate and House Armed Services Committees; and (2) That it is the sense of the Senate that the President will submit reports on the subject to Congress at intervals of not more than six months.

Clearly enough, a Senate declaration that the President "in taking action" to send troops to Europe should consult with certain designated committees of Congress is something very different from the declaration sought by the Wherry Resolution that the President should not take such action without prior passage by Congress of an authorizing act or resolution. If the Connally-Russell substitute passes in anything like its present form, it will be a precedent that will be cited by both sides of the argument in future disputes on the recurrent constitutional question. The issues are of such vast significance, and of such particular concern to lawyers interested in constitutional developments and in the future of congressional institutions, that the report begun here will be continued, with particular reference to subsequent developments in the "Great Debate", in a later number of this department.

February 28, 1951

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

United States Treaty Developments During 1950

■ It seems to be the case that too few Americans are fully acquainted these days with the extraordinary number and variety of the international engagements into which the United States has entered since the end of the war in 1945. To those who are inclined to look askance at the possibilities of co-operation among nations, it may come as a surprise that since the beginning of 1946 the United States has been a party to some 600 international agreements of every description, of which only a very few have attracted much public attention. In the year 1950 alone, which shows some falling off from the postwar average, more than seventy-five agreements to which the United States was a party entered into force.

This figure for 1950, calculated from the *Department of State Bulletin* and from the texts so far published in the Department's *Treaties and Other International Acts Series*, is only approximate; yet it serves to indicate the continuous and largely unnoticed activity which goes on in this field. The figure does not include agreements published in 1950 but in effect earlier, or agreements signed but not in force in 1950.

Of this total of some seventy-five instruments, only about nine were "treaties" in the constitutional sense, submitted to the Senate for its advice and consent prior to ratification. The remainder were the result of executive action only. While this ratio may seem disproportionate at first glance, it should be noted that a large number of these agreements either were made pursuant to some policy already established by Congress, or else dealt with relatively routine or minor matters. Thus fourteen economic co-operation agreements, the largest single group, were made in 1950 solely to bring earlier ECA arrangements into conformity with amendments passed in 1949 to the Economic Cooperation Act.

The next largest group, ten in number, consisted of agreements under the Mutual Defense Assistance Act of 1949, establishing arrangements for the handling of military supplies and raw materials within the framework of policy therein laid down. Eight of the ten were entered into with countries of Western Europe and represented a logical development of the principles enunciated in the North Atlantic Treaty of April 4, 1949; the other two were made with Korea (as long ago as January 26, 1950) and with Iran.

Several agreements entering into force during the year provide for educational interchanges under the Fulbright Act. That with Pakistan of September 23, 1950, was the twentieth arrangement of this kind to be concluded. Like its predecessors it finances, from funds in local currency supplied by the United States, opportunities for Americans to study and teach in Pakistan; and it also pays the transportation costs of Pakistani nationals coming to the United States for similar purposes.

In the more or less routine category of agreements were several dealing with routes and stops for commercial air services, others dealing with visa fees and travel arrangements, and still others concerned with exchanges of official publications. More important, as models of other similar agreements to be concluded in the future, were a model Point Four technical co-operation agreement with Ceylon, a model consular convention with Costa Rica, and a model convention of friendship, commerce and navigation with Ireland.

With all the foregoing laid aside, there remain eight or ten agreements effective in 1950 which have some aspects of special interest but which have not received much notice outside of the circles immediately concerned with them. A few comments on these individually may not be out of place.

Two agreements made in 1950 evidence the continuing close co-operation between the United States and Great Britain on arrangements to promote the common defense. The first of these, made July 21, 1950 (*Treaties and Other International Acts Series* 2099), is concerned with the establishment, for the joint use of both Governments, of "The Bahamas Long Range Proving Ground" for guided missiles. The range therein described, extending more than 500 nautical miles from off the Florida coast to the southeasternmost Bahamas, includes a large area of high seas as well as of Bahaman territorial waters (but does not include Nassau or its vicinity). The agreement makes no reference, however, to possible restrictions on the use of this high seas area. In that part of the range lying within Bahaman territory extensive rights are granted to the United States, for a minimum term of twenty-five years, to construct and maintain installations and to insure the security of such installations. These rights include rights of jurisdiction not only over its own personnel, but also under certain specified conditions over British nationals and local resident aliens.

The rights of jurisdiction granted in the Proving Ground Agreement are substantially identical to those conferred in a second agreement of August 1, 1950 (T.O.I.A.S. 2105), regarding American leased bases in Bermuda, the Bahamas, Jamaica, St. Lucia, Antigua, Trinidad, and British Guiana. This arrangement revised, in the light of postwar condi-

tions, the rights of jurisdiction granted to the United States in the original Bases Agreement of March 27, 1941; but the revision seems more procedural than substantive. The most notable innovation is that under both 1950 agreements jurisdiction over British nationals and local aliens may be exercised only by a civil court of the United States sitting in the local territory. Such an extraterritorial American civil court would be an interesting revival in a new connection of that extraterritorial judiciary which formerly functioned in many areas of the Middle and Far East.

An agreement of a wholly different kind, yet displaying the same close collaboration on a matter of common interest, is the full-dress Canadian-American treaty of February 27, 1950, regarding the uses of the waters of the Niagara River (T.O.I.A.S. 2130). Expressly recognizing the obligation of both Governments to preserve and enhance the beauty of Niagara Falls, the treaty provides for the completion at joint expense of remedial works designed to produce an unbroken crestline on the Falls. With a nice eye to seasonal variations in the tourist trade, the treaty also guarantees a water flow over the Falls of at least 100,000 cubic feet per second between 8 A.M. and 10 P.M. (Eastern Standard Time) daily from April 1 to September 15, and a similar flow up to 8 P.M. daily from September 16 to October 31; at other times visitors must be content with a guaranteed minimum of 50,000 cubic feet per second. According to the terms of the treaty, the water flow above these minima will be available for power purposes to each country in equal shares; but a reservation made by the Senate in consenting to ratification asserts the exclusive right of Congress to determine the use of the United States' share.

Successful and important international co-operation often takes place in fields which do not receive much publicity. One example is a multilateral protocol of November 19, 1948, which was ratified by the United States in 1950, providing for the extension to new synthetic drugs of long-established international measures for the control of narcotics. Another instance is three agreements regarding work in meteorology which entered into force in 1950 and to which the United States is a party. One of these is the multilateral convention establishing a World Meteorological Organization in which at least thirty-eight States are participating (T.O.I.A.S. 2052). The Organization, intended to facilitate worldwide collection and dissemination of weather data and to promote the use of standard techniques, is among the newest of the many specialized agencies set up within the framework of the United Nations. Its potential usefulness is obvious.

A second weather agreement, made with Canada on June 22, 1950 (T.O.I.A.S. 2103), envisages a network of seven ocean weather stations across the North Pacific: five to be operated by the United States, one by Canada, and one by Japan. And a third arrangement, entered into by eleven North Atlantic States under the auspices of the International Civil Aviation Organization, provides similarly for ten ocean weather stations in the North Atlantic (T.O.I.A.S. 2053). From a legal point of view, perhaps the most interesting feature of this last agreement is that it was signed "subject to acceptance by signatory Governments". It would seem difficult, from the international standpoint, to distinguish an act of "acceptance" from one of "ratification"; but from the standpoint of American constitutional law, "acceptance" would appear to afford a means of avoiding that reference to the Senate which the Constitution requires prior to "ratification". The present agreement was not submitted to the Senate, but the United States' "instrument of acceptance" was duly deposited with ICAO on August 23, 1949, and the agreement entered into force on January 13, 1950.

Four agreements with respect to fisheries were brought into force in 1950, of which the most notable was the Northwest Atlantic Fisheries Convention signed at Washington on February 8, 1949, by representatives of Canada, Denmark, France, Great Britain, Iceland, Italy, Norway, Portugal, Spain, and the United States (T.O.I.A.S. 2089). The Convention, the first multilateral agreement to be signed by all the principal states participating in the Grand Banks and other important northwest Atlantic fisheries, establishes machinery for the scientific study of the fisheries under the direction of an international commission. On the basis of this study, the commission is to propose to the several governments such regulatory measures as seem necessary for preserving the fisheries at maximum yield without permanent injury. Acceptance of the proposals is left up to each government. The Convention applies only outside of territorial waters, and an express provision declares that nothing in the Convention is to prejudice the claims of any contracting government with respect to the limits of territorial waters or to the jurisdiction of a coastal state over fisheries. Reservations regarding this provision were entered by France and Spain at the time of signing. The Convention came into force on July 3, 1950, after ratifications were deposited by four governments: the United States, Britain, Iceland, and Canada.

Two conventions, one with Mexico (T.O.I.A.S. 2094) and one with Costa Rica (T.O.I.A.S 2044), are concerned with the tuna fisheries in the Pacific Ocean. Signed in 1949 and in force in 1950, each provides for a joint commission to conduct scientific studies; these bodies, unlike the Northwest Atlantic fisheries commission, have no power to propose regulatory measures. This omission may be due to the fact that the Pacific tuna fisheries have not yet been so extensively studied, with the consequent belief that suggestions for regulation should be deferred until adequate scientific data are at hand.

Also on the Pacific coast, a convention of March 24, 1950, between

the United States and Canada makes provision for reciprocal port privileges for vessels engaged in the halibut fishery (T.O.I.A.S. 2096). That fishery, once almost exhausted, has long been the object of Canadian-American concern; as the result of careful joint study and regulation under agreements made in 1923, 1930, and 1937, it has been successfully restored to a healthy condition. As perhaps the leading instance in its field of what can be accomplished by international agreement over a period of time, it is an encouraging precedent to cite in concluding this rapid survey of recent international engagements of the United States.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.**

Taxing Continued Salary Payments to Employees' Widows

■ There are relatively few instances in tax law in which the deduction of an expense by one taxpayer is not counterbalanced by the taxation of the payment to the recipient. One of the exceptions has been, until very recently, the payments which an employer *voluntarily* makes to the widow of a deceased employee. Before January 1, 1951, the employer was given the benefit of a deduction for a limited period (usually two years), but the widow did not have to pay a tax. In her hands, the amount was regarded as a nontaxable gift. Now, however, the vacuum has been filled, and the Government will insist on collecting a tax from the widow. (I. T. 4027, 1950-21 Int. Rev. Bull. 2).

The Bureau of Internal Revenue's previous attitude had been expressed in two rulings issued in 1921 and 1939. (O. D. 1017, 5 CB 101; I. T. 3329, 1939-2 CB 153). They were based on the simple proposition that since the widow had performed no services for the employer, the payment to her could not be compensation and must therefore be a gift. A decision of the Supreme Court (*Bogardus* v. *Commissioner*, 302 U. S. 34) also seemed to lend support to that theory.

During the World War II period, however, when old ideas were being scrutinized to discover if some revenue-producing feature had been overlooked, the Bureau became convinced that it had been much too generous with widows. A Fifth Circuit decision in 1946 (*Varnedoe* v. *Allen*, 158 F. (2d) 467) gave it an opportunity to take a more hard-hearted position. In that case the widow of an Atlanta fireman was paid $100 a month by the city, pursuant to state law, and the court held that the payments were taxable to her as compensation. Here, of course, there was an *obligation* to pay, and the court might have been content to rest its decision on that factor. (*Cf. Flarsheim* v. *United States*, 156 F. (2d) 105). But it went on to say, in effect, that if any services had been rendered to a payer, *even by someone other than the payee*, a payment could not be considered a gift or gratuity.

Seizing upon this language, the Bureau took the position that payments to the widow of a deceased officer or employee, "in consideration of services rendered by the officer or employee", must be taxed to the widow. The only exception the Bureau is willing to recognize is the case where no services have been rendered to the payer either by the recipient or anybody else. For example, payments by the Carnegie Foundation for the Advancement of Teaching to widows of teachers, not based on any service to the foundation, are admitted to be tax-free gifts. (L. O. 1040, 3 CB 120).

The first judicial examination of I. T. 4027, although not a clear-cut victory for the Treasury, is certainly discouraging to the proponents of the opposite view. The case of *Estate of Bausch* v. *Commissioner*, C. A. 2, January 25, 1951, presented a fairly typical situation. Two officers of Bausch & Lomb Optical Company had died, and the company continued to pay their usual salaries to the decedents' estates for one year following their deaths. Similarly, it had paid a year's salary to the widow of another officer and to the estate of still another, when both had died some years before. After noting that (1) the payments were deducted on the company's tax returns, (2) they were made as a matter of practice, and (3) they were based upon the salaries which had been previously paid, the court held it to be a reasonable inference that they were a reward for past services. Then, citing the Bureau's change in position, the court made this statement: "In the case at bar the payments were a reward for services performed for the employer. That alone should be enough to render the payments taxable." Certainly this can be construed as an endorsement of I. T. 4027.

Instead of stopping there, however, the court went on to base its decision on Section 126 (a), I. R. C., which deals with "income in respect of decedents". Less than two years before, the same court had decided that the payment of a bonus to a deceased employee's estate was taxable under that section, on the ground that the "right to receive the amount" (the statutory language) was "not necessarily a legally enforceable right but merely any right derived through his services rendered while living".

Contributed by committee member William E. Jetter.

(*Estate of O'Daniel* v. *Commissioner*, 173 F. (2d) 966). The parallel was too close at hand to resist. In both cases there was an unenforceable, voluntary payment. In both cases the payments were made to the decedents' estates. Therefore, said the court, the Bausch executors were taxable under Section 126 (a) "upon receipts for services by their testators".

The court then went on to say:

> Though the correctness of the ruling as to widows in I. T. 3329 would seem doubtful if applied to all cases, it is unnecessary to consider under what circumstances sums paid to a widow or to other persons might be mere gifts and nothing more. . . .

Despite some lack of clarity in the opinion (including the interesting possibility that Judge Hand might have intended to refer to I. T. 4027 instead of 3329 in the above quotation, since he had already noted the fact that 3329 had been modified by the Treasury), the *Bausch* case will provide considerable ammunition for the Treasury in its fight to tax salary payments to an employee's widow. Apparently the only way to escape the conclusion of the case is to avoid its premise—that the payments were intended as compensation for services rendered. Even the Bureau's new ruling refers only to payments made "in consideration of services rendered". To prove that the payments were really gifts will generally be a difficult job, for in most cases the employer does not want to lose the benefit of a deduction, he ordinarily bases the payments on the size of the decedent's salary, and he tries to follow a uniform and impartial practice. These three facts were enough to convince the Second Circuit that the payments were a reward for services, and the attorney's task will be to bring out other factors to persuade a court that the payments were not intended as compensation. For example, he may be able to point to a change in the identity of the employer, a willingness on the part of the payer to forego the corresponding deduction, or a difference in the amount from that of the decedent's former salary. Such factors may help a court determine that the payments were actually gifts within the scope of the *Bogardus* decision.

It will probably be futile for the attorney to hammer home the point that the payments to a widow were purely voluntary, on the theory that a voluntary payment is automatically a gift. It has long been established that a payment made without legal obligation is not necessarily a tax-free gift within the meaning of the Internal Revenue Code. The leading case on the subject involved the voluntary assumption by an employer of the payment of income tax on an employee's salary. In deciding that the payment of the tax was itself subject to tax, the Supreme Court said that "the payment for services, even though entirely voluntary, was nevertheless compensation". (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716).

Possibly a distinction will be developed by the courts between payments to an employee's widow or other heirs and payments to his estate. The Tax Court, for example, has already drawn this line of demarcation in order to reconcile its opinions in *Bausch*, 14 T. C. 1433, and *Aprill*, 13 T. C. 707. In the *Aprill* case, decided only eight months before *Bausch*, the court had held that voluntary payments to a *widow* were tax-free gifts. The distinction, it was admitted, was a narrow one. A federal district court has also emphasized that a payment to the estate of a decedent rather than to members of his family was an indication that the employer intended to pay additional compensation, not to make a gift. (*Brayton* v. *Welch*, 89 Fed. Supp. 537).

Even though other courts will have to speak before the question can be regarded as settled, I. T. 4027 fared well enough before the Second Circuit to make it appear likely that widows have lost a valuable source of tax-free income. In fact, the tax may be considerably *greater* on the amount received by a widow than it was on the same amount received by her husband, because of the loss of the right to use the split income provisions. As a consequence, the widow will have *less* spendable income during the critical period of adjustment than she has been used to, thus defeating to some extent the employer's purpose in continuing the salary payments. If this result is deemed socially undesirable, the answer to the problem may lie in new legislation, since, under present law, a coldly realistic approach makes it seem unlikely that the payment will be regarded in most cases as anything other than taxable compensation.

OUR YOUNGER LAWYERS

Richard H. Bowerman, Secretary and Editor-in-Charge, New Haven, Connecticut

How Can a Lawyer Recalled to Military Service Hold His Practice?

By Paul W. Lashly

■ In these troubled times, it is probably no exaggeration to say that many members of the Junior Bar Conference, as they sit back in their office chairs and hear of colleagues being called or recalled for military service, are pondering a vital question: What happens to my own practice if I am called into service?

In a preceding issue of the JOURNAL, Chairman George S. Elmore of the Conference War Readjustment Committee has lucidly delineated the *quandary* of the lawyer summoned into his country's service in regard to obtaining enough time to wind up his professional affairs and his then succeeding question as to whether, after going into service, his legal experience and training will be utilized or if, in the manner joked about in the last war, a legal background will be regarded by the military personnel authorities as the best training for a wheelbarrow.

It is the purpose of this article to analyze the problem of the lawyer about to don uniform in regard to holding his practice and trying to preserve it as best he (or perhaps she!) can during the interruption. It scarcely is necessary here to point out that the lawyer's practice is to him what the entire capital investment of a businessman is, including plant, equipment, machinery, and organization know-how, with the important exception that if a businessman for any reason has to go out of business, normally he may sell his business as a going concern or else piecemeal, whereas the lawyer may not.

Roughly, lawyers faced with this problem can be divided into four proximate categories: nonveterans recently admitted to practice; veterans whose legal education was either interrupted by the war or deferred until after the war so that they graduated from law schools after returning and, therefore, have had anywhere from one to five years time spent in the development of legal skills and the building of a practice; veterans who had completed their education either just before the war or who were given time to complete their education and then called into military service, thus like the preceding group, beginning their practice after the war; and veterans who had completed their legal education perhaps several years before being called into service in the last war. While the problems of a lawyer in any one of these groups are grave and trying, it would appear that the prospect of military service at this time works the greatest hardship on the latter group, although this does not minimize the loss to the first three classes.

Particularly is this true for the man who had worked up a practice prior to World War II only to see this practice disintegrated by four or five years military absence, being thus compelled to start again from scratch and build up another practice during the past five or six years only now to be faced with the prospect of repeating his experience of the last war and returning again to find nothing, and thus constrained once more, rather like a lost generation, to start the wearying task of rebuilding a practice for the third (and final?) time. Regardless of the category in which any particular lawyer falls, it behooves him to profit from his past experience and look about him to determine how he may better this time, if called, protect his practice or—to put it another way—his now vulnerable capital investment.

At the outset, the problem appears to divide itself into those steps which the lawyer may himself take and carry through, and those steps which must necessarily be carried out by the organized Bar upon local, state and national levels. This division is dictated by the necessity of educating the public—and, perhaps, even lawyers themselves—regarding certain aspects of the problem of the lawyer called into military service, which task can be accomplished only by the organized Bar. The public can and will see no difference between the case of a professional man called into service and that of a salaried employee or the operator of a business, unless and until the organized bar, in the manner of organized medicine, takes upon itself the responsibility first of all of bringing to the attention of the public that if, as clients, their particular counselor is called to military service, that they then owe both a personal and a patriotic duty to the departing lawyer to recognize his devotion and service to them in the past which recognition well might take the form of concluding some interim arrangement with one or more lawyers who remain, with the expectation of returning their legal affairs to the care of the original lawyer upon his resumption of practice; and secondly, indoctrinating the members of the Bar who remain in not only the absolute necessity of scrupulously observing agreements with the lawyer turned temporary soldier, which goes without saying, but also the obligation to keep before the attention of each such client the fact that the homefront lawyer is serving only in a substitute and temporary capacity for the departed lawyer. Various devices might be utilized for this purpose, such as designating the departed lawyer as "of counsel" on all pleadings filed or briefs prepared for such clients, or correspondence directed to or on behalf of such clients, and otherwise keeping the name of the departee alive in connection with his clients. It goes without saying that these suggestions would not apply to a man who is already a

partner or integral associate of a firm. Quite probably, a well chosen association or partnership is the best solution to this—and many other—problems of the service bound attorney.

The very nature of the client-lawyer relationship, personal as it is, probably renders it impossible to protect completely the clients of a departed lawyer by any fiat. It is, therefore, all the more necessary that the organized Bar and the successor-lawyer co-operate closely in an effort, so to speak, to hold so far as is possible, each client of a service departed lawyer in trust for his return. Doing so will unquestionably involve many difficult and onerous responsibilities, much extra effort, and solutions which cannot be mechanically cataloged here. But surely the organized Bar can and should do more in this direction than was done in the last war.

Certainly, however, and purely by way of illustration, the public relations committees or officers of each bar association can see to it that the elements of the problem are clearly stated and explained in the local newspapers; that one or more of the local bar leaders discuss fully before the membership of that bar the responsibilities that those who remain bear to those who are called to service in preserving for them, so far as possible, the clients left behind in the care of the lawyers remaining at home; and perhaps the local reference service, placement bureau, or other similar agency of each local Bar can act in bringing the departing lawyers together with those who are remaining behind and who would be willing to take over upon a trusteeship basis the former's clients, the associating of clients "left behind but not abandoned" with such "trustee-lawyers", and likewise perhaps formularize a more or less standard suggested basis for apportionment of fees between the departed and homefront lawyers.

Obviously, what steps the organized Bar can take in this regard will be largely a local matter, dependent upon the size of the bar concerned, the proportion at that particular bar of those who leave to those who remain, prior customs at that bar, and other such governing factors. It will, however, just as unquestionably be the task of the state bars and the American Bar Association to act as a clearing house for various solutions to these problems, to sponsor discussion and action on the questions involved, to encourage those bar groups who remain without a program of this sort, and to provide the long-range planning necessary for the successful handling of this vital problem over the forthcoming troubled years.

It is all very well to point a finger at the organized Bar and attempt to exact from it help in protecting the practice which each departing lawyer has so laboriously secured. However, no matter how splendidly the organized Bar does meet this challenge, nevertheless, its efforts will fall far short of success unless each lawyer recalled into service faces his personal problem squarely, thinks it through carefully, and then on his own takes the various steps open to him—and which really only he can take—to the end that his practice will be in such situation that it can be turned over upon a trusteeship basis to another lawyer or lawyers.

As soon as it becomes definite that he will be recalled, certainly it is the duty of each lawyer to advise the client of the date when the lawyer will no longer be available for the handling of the client's affairs. It is likewise a duty of the departing lawyer to recommend a successor lawyer and to inform the client as to the basis of selection of such a lawyer. It would also be in keeping for the departing lawyer at this time to explain carefully to the client that the lawyer hopes he is surrendering conduct of the client's affairs only temporarily in order to discharge what he considers to be the highest duty of a citizen and accordingly to elicit the client's understanding, support and cooperation at this propitious moment. If the departing lawyer has selected a competent lawyer who can handle the legal affairs of that particular client and likewise one who will appreciate to the fullest his responsibilities to the departing lawyer, the major step has been properly executed.

GEORGE S. ELMORE

Chairman, War Readjustment Committee

It nevertheless should be the aim of every lawyer to maintain as close contact as possible with the clients left behind, which can perhaps be accomplished by the sending of short notes to them at appropriate intervals. Taking steps to be placed upon the mailing list for publications or correspondence from the local bar association, the state bar association, and the American Bar Association; taking advantage of the offers of publishers of the advance sheets to receive a gratis service subscription to such advance sheets while in service is a wise course for the lawyer entering service.

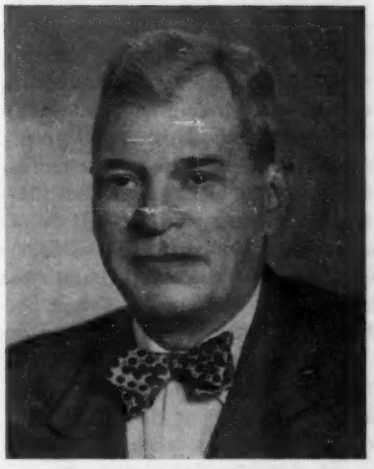
Proceedings of the House of Delegates:

February 26-27, Chicago

■ The chronological summary of the proceedings of the House of Delegates contains important reports and debates which will be of interest to every lawyer. The first session convened with an attendance of 179 members present. The following reports were made in this session: Board of Governors, Budget Committee, Committees on Judicial Selection, Tenure and Compensation, American Citizenship, and the Committee To Study Communist Tactics and Objectives.

Announcement was made of a number of outside grants of funds to carry on the work and objectives of the Association. A spirited debate followed the presentation of resolutions of the Committee To Study Communist Tactics and Objectives, presented by the committee's chairman, Austin F. Canfield, of the District of Columbia.

The Board of Governors announced the acceptance of an invitation to hold the 1952 Annual Meeting in the City of San Francisco from September 15 through 19, 1952.



ROY E. WILLY
Chairman, House of Delegates

FIRST SESSION

■ The House of Delegates convened for its 1951 Mid-Year Meeting at the Edgewater Beach Hotel, Chicago, Illinois, at 10:00 A. M. Monday, February 26, 1951. Roy E. Willy, of South Dakota, Chairman of the House, presided.

After the roll call by Joseph D. Stecher, of Ohio, Secretary of the Association, Glenn M. Coulter, of Michigan, Chairman of the Committee on Credentials and Admissions, reporting for his committee, said that the roster as read by the Secretary during the roll call had been approved by the committee. On his motion, the House voted approval of the report.

On motion of Secretary Stecher, the House then voted approval of the record of the last meeting of the House in Washington last fall.

Chairman Willy then introduced Cody Fowler, of Florida, President of the Association, who reported on the work of various committees and Sections of the Association and summarized the aims of his administration during the year.

The following members of the House offered resolutions for reference to the Committee on Draft: Frank W. Grinnell, of Massachusetts; John R. Snively, of Illinois; Edwin M. Otterbourg, of New York; and James E. Palmer, of the District of Columbia. The subject matter of these resolutions and the disposition made of them by the House is reported on page 322.

House Hears Report of Board of Governors

Secretary Joseph D. Stecher and Assistant Secretary Joseph D. Calhoun, of Pennsylvania, then read the report of the Board of Governors, in which the following were reported:

(1) Re-election of Mrs. Olive G. Ricker as Executive Secretary and reappointment of Judge Edward T. Fairchild, of Wisconsin, William P. MacCracken, of the District of Columbia, and Harold L. Reeve, of Illinois, as members of the Board of Elections.

(2) Grant to the President of authority to continue such special committees as he deemed advisable in his discretion, and to appoint advisory committees. Under this authority, a special committee has been created to assume centralized responsibility for the Traffic Court Program.

(3) Election of James P. Economos, of Illinois, and Joseph D. Calhoun, of Pennsylvania, as Assistant Secretaries of the Association.

(4) Grant of authority to the Committee on Unauthorized Practice of the Law to assist the Minnesota State Bar Association in the case of *Gardner* v. *Conway*, now pending in that state.

(5) Approval of the recommendation of the Committee on Publications of a "package plan" of subscriptions for law and other libraries, lay groups and organizations, and nonmember individuals in the United States not eligible for membership in the Association, whereby the subscriber is to receive the Annual Report, Section proceedings, Advance Programs and periodicals.

(6) Announcement that substantially 50 per cent of the members of the Association returned the postal card indicating their desire to receive the Annual Report. The reduction in the number of volumes that must be printed will result in a savings of approximately $15,000 over last year when distribution to all members was required by the By-Laws.

(7) Creation of a Special Committee on Lawyers in the Armed Forces as recommended by the Junior Bar Conference. The committee, composed of the President of the Association as chairman, the Chairman of the Junior Bar Conference, and the Chairmen of the Committees on Legal Aspects of National Security, Military Justice and Legal Service to the Armed Forces, will confer with the Secretary of Defense and other government officials on devising means of achieving better utilization of the professional skill, training and experience of lawyers in the Armed Forces.

(8) Adoption of the following resolution pursuant to the authority given the Board by Article II, Section 3 of the By-Laws:

> RESOLVED, That members of the American Bar Association in good standing, including members hereafter elected who shall have paid one year's full dues, shall, upon written request, have their dues remitted while in active service of the Armed Forces of the United States. The JOURNAL and the Annual Report shall be sent to such members only upon request; provided, however, that the provisions of this resolution shall have no application to members of the Association who have entered the military service as a career.

(9) Approval of an increase in the dues of the Sections of Municipal Law, Mineral Law and Real Property, Probate and Trust Law from $2.00 to $3.00 per year in each case.

(10) Approval of amendments of the by-laws of these Sections and of the Sections of Administrative Law, and Patent, Trade-Mark and Copyright Law.

(11) Election of Frank E. Holman, of Washington, as a member of the Committee on Scope and Correlation of Work to serve during the remainder of the term of the late Robert R. Milam, of Florida.

(12) Appointment of E. J. Dimock, of New York, and Loyd Wright, of California, to represent the Association on the Board of Governors of the American Law Student Association.

(13) Temporary appointment of Joseph D. Stecher, of Ohio, as Acting Director of Activities on a part-time basis. This appointment was terminated at the February meeting of the Board and it was voted to employ a full-time Director.

(14) Adoption of the following resolution upon recommendation of the Committee on Unauthorized Practice of the Law:

> WHEREAS, a statement of principles relating to practice in the field of Federal Income Taxation promulgated by the National Conference of Lawyers and Certified Public Accountants on February 8, 1951, at New York City has been duly approved by this Association's Standing Committee on Unauthorized Practice of the Law,
>
> NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association approves the statement of principles relating to practice in the field of Federal Income Taxation promulgated by the National Conference of Lawyers and Certified Public Accountants at the City of New York on February 8, 1951.

(15) Adoption of the following recommendation submitted by Arthur J. Freund, of Missouri, former Chairman of the Special Committee To Investigate the Feasibility of a Scientific Study of the Effect of Mass Media Entertainment upon Law Enforcement and the Administration of Justice:

> 1. That the Special Committee be continued and reappointed for the current year.
>
> 2. That it be authorized to proceed toward its objectives.
>
> 3. That it be authorized to make inquiry to ascertain whether funds from one or more foundations sufficient to finance the design for research may be obtained, and if so, upon what terms, and to report to the Board the results of such inquiry, all without expense to this Association.

(16) Adoption of the following resolution recommended by the Special Committee on Retirement Benefits for Lawyers:

> WHEREAS, the present high level of federal taxation on earned income makes it virtually impossible for professional persons and other recipients of earned income to provide for their retirement from their income; and
>
> WHEREAS, the problem of providing retirement benefits has to a great extent been solved for corporate employees by Section 165 of the Internal Revenue Code; and
>
> WHEREAS, the need for such retirement benefits is equally great in the case of professional persons and other persons having earned income but not covered by a pension plan;
>
> NOW, THEREFORE, BE IT RESOLVED, That the Board of Governors of the American Bar Association favors in principle amending the Internal Revenue Code so that taxpayers not covered by a pension plan qualified under Section 165 of the Code may be encouraged by a tax credit, a tax deduction, or other means to accumulate, out of current earned income, funds which would be available under appropriate regulations of the Treasury Department to provide retirement income for such taxpayers; and
>
> FURTHER RESOLVED, That the Special Committee on Retirement Benefits for Lawyers of this Association be authorized to draft specific legislation along the above lines to be later submitted for approval to the House of Delegates of this Association.

(17) Approval of the following resolution suggested by Chief Justice Arthur T. Vanderbilt of New Jersey and approved by the Committee on Legal Aid Work:

> WHEREAS, The American Bar As-

sociation, by resolution adopted at its 1950 Annual Meeting in Washington declared that its policy with reference to legal aid was:

1. That it is the primary responsibility of the legal profession to assume the leadership in establishing adequate legal aid in conjunction with private agencies;

2. That the state bar associations should encourage and assist local bar associations in organizing needed legal aid service in their respective states;

NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association through its Committee on Legal Aid Work recommends a procedure to the state bar associations as follows:

a. That the President of each state bar immediately request the Chief Justice and the Chairman of the state bar legal aid committee to act with him in creating and executing a state-wide legal aid plan, and

b. That legal aid societies be organized as a basic community service in each county by local bar associations and be financially supported through private sources without government aid, and

c. That each member of the Board of Governors pledges his cooperation and assistance to the Legal Aid Committee of the American Bar Association and to the state bar associations of his circuit in organizing and implementing such plan and procedure.

(18) Referral of a proposal to create a new Section of Antitrust Law to the Committee on Scope and Correlation of Work.

(19) Adoption of an appropriate resolution recording recognition of the significant contribution of the late Herbert L. Harley to the improvement of the administration of justice. Mr. Harley was founder and secretary of the American Judicature Society and recipient of the Association's Medal in 1938.

(20) Acceptance of an invitation to hold the 1952 Annual Meeting in the City of San Francisco from September 15 through 19, 1952.

The House voted to approve the Board's report on motion of the Secretary.

Harold H. Bredell, of Indiana, Treasurer of the Association, then gave his report. He said that receipts were $466,000 for the first seven months of the current fiscal year as compared with $454,000 for 1949-1950. He said that expenditures were running much the same this year as in comparable periods in 1949-1950, except that for the increased cost of the Annual Meeting in Washington last year. Naturally, Mr. Bredell said, the Association's dollar is shrinking, and the Association must face increasing costs as it goes along. He also announced the following outside grants of funds:

$75,000 to the Survey of the Legal Profession from the Carnegie Corporation of New York.

$25,000 to the Committee To Investigate Organized Crime in Interstate Commerce from the Rockefeller Foundation.

$500 to the Section of International and Comparative Law from the West Publishing Company to offset part of the Section's printing expenses.

$5000 to the Traffic Court Committee from the Association of Casualty and Surety Companies.

$8000 to the Conference of Chief Justices from the Rockefeller Foundation and the Davella Mills Foundation, part of which was refunded because it was not all expended.

$2000 to the Section of Administrative Law for a prize essay contest from the West Publishing Company.

Robert W. Upton, of New Hampshire, Chairman of the Sub-committee of the Board of Governors on Budget, reported. He said that appropriations for the current year total $537,740.20, and that the income available to meet these appropriations is estimated at $480,500, thus leaving a deficiency of about $50,000. The situation is not so serious as the figures indicate, Mr. Upton said, for some of the appropriations will not be fully expended, and the Subcommittee hope to escape a deficit for the year with the cooperation of those who are responsible for the activities of the Association.

The report of the Committee on Judicial Selection, Tenure and Compensation was given by Morris B. Mitchell, of Minnesota, the committee chairman. He said that most of the state bar associations had appointed committees to study the American Bar Association plan for judicial selection, pursuant to a request contained in a resolution passed by the House last fall. He announced that Jefferson County, Alabama, had adopted the plan by referendum, and that a number of state legislatures had the plan before them in the form of legislative proposals. His committee is also working on the problem of increasing the pay of judges and the adoption of retirement plans for members of the judiciary.

John C. Cooper, of New Jersey, reported for the Committee on American Citizenship, of which he is chairman. He declared that the committee regards itself as a service organization for the purpose of coordinating the citizenship work done by state and local bar associations, and was proceeding on that basis. He reported on four resolutions referred to his committee at the last meeting of the House. One was still under consideration, he said, and the second dealt with co-operation with the Crusade for Freedom. No action was taken on the latter because the Crusade for Freedom had ended by the time the resolution was referred to the committee. He moved that the following be adopted in regard to the two remaining resolutions referred to his group:

1. It is recommended that the resolution submitted to the last Assembly of the American Bar Association, and subsequently referred to this committee, dealing with a proposed investigation of naturalization proceedings, be not adopted for the following reasons:

The proposed resolution appears to deal solely with naturalization proceedings in the courts, and does not appear to take into consideration the careful preliminary examination of applicants made by the Immigration and Naturalization Service of the Department of Justice prior to the formal court proceedings, also

The resolution, if adopted, would, in the judgment of the committee, require a special appropriation by the American Bar Association to finance a long, difficult and perhaps costly inquiry which, in the judgment of the committee, is not now justified.

2. It is recommended that the resolution submitted to the last Assembly of the American Bar Association, and subsequently referred to this committee, dealing with the proposed creation

of a special committee to be known as "Special Committee on Measures to Combat Communism," be not adopted for the following reasons:

> Prior to the introduction of this resolution the House of Delegates had adopted a similar resolution pursuant to which the President of the American Bar Association has appointed a special committee "to study Communist tactics, strategy and objectives," which committee has already been organized and is actively dealing with this subject—thereby appearing to render unnecessary and inadvisable the appointment of another special committee as contemplated in the resolution submitted to the Assembly.

In reply to a question by John M. Slaton, of Georgia, Mr. Cooper said that the committee's inquiry into the subject matter of the first resolution convinced it that the Naturalization Service was operating efficiently and that no evidence had been shown that politics was involved.

R. V. Welts, of Washington, spoke on the subject of American citizenship. He declared that the Association should consider setting up a program of teaching citizenship in the schools, directed by lawyers. The American Bar Association is the only group in the country that can do the job that has to be done, because of its understanding of the problem of government, and a future recommendation by the American Citizenship Committee and action by the Association will go "far towards producing a continuous, intelligent, serviceable citizenry which will bid fair to retrieve and preserve those rights which we conceive to be inherent in free men".

The House then turned to consideration of the report and recommendations of the Committee To Study Communist Tactics and Objectives, presented by the committee's chairman, Austin F. Canfield, of the District of Columbia. He had five resolutions dealing with action to be taken by the House against Communism in the legal profession, he said. The recommendations were made after a thorough study by the committee members of the problems raised by Communist strategy in the United States, as evidenced by the conduct of counsel representing Communists accused of conspiracy to overthrow the Government by force. The committee's study of the literature had convinced it that the lawyer's oath to support the Constitution was incompatible with membership in the Party, he said, and the committee hoped that its recommendations would help to remove members of the Communist Party from the practice of law.

He then moved adoption of the first resolution, which reads as follows:

> WHEREAS, the Communist Party and Marxism-Leninism call for the establishment in the United States of a dictatorship "untrammeled by law," and
>
> WHEREAS, the American Constitutional system and the American principle of individual rights and duties would be violated by such a system, and
>
> WHEREAS, such concept is incompatible with the obligations of a lawyer as an officer of the courts of the United States and the several states,
>
> BE IT NOW THEREFORE RESOLVED, That the American Bar Association expel from its membership any and every individual who is a member of the Communist Party of the United States or who advocates Marxism-Leninism, and
>
> BE IT FURTHER RESOLVED, That this resolution, after adoption by the House of Delegates, be referred immediately by the President of the Association to an appropriate committee of the Association for prompt action.

Whitney North Seymour moved to amend the resolution by adding the phrase "and who has forwarded the objectives of" after the words "who is a member of" and to substitute "the overthrow of the Government by force" for "Marxism-Leninism". The resolution says that membership in the Communist Party is professional misconduct and that such misconduct should be penalized by expulsion, he declared, and his amendment would make that clear. He said that the phrase "Marxism-Leninism" was vague and that it is the advocacy of violent overthrow of the Government that we are concerned with.

Frederic M. Miller, of Iowa, speaking for the Board of Governors, moved to amend the committee's resolution so as to call for expulsion by the Board. He said that the Constitution of the Association gives the Board power to expel members for misconduct and that his amendment was offered to prevent a by-passing of the Constitution.

LeDoux R. Provosty, of Louisiana, moved to table Mr. Miller's amendment. Chairman Canfield said that the committee had inserted language in its resolution that took care of the objection stated by Mr. Miller. The House then voted to table the amendment presented by Mr. Miller.

The House then heard John Kirkland Clark, of New York, and Tracy E. Griffin, of Washington, speaking in favor of the original resolution of the committee without the amendments proposed by Mr. Seymour. Mr. Griffin presented clearly the definition of the dictatorship of the proletariat in the language of the Communists themselves: "The domination of the proletariat over the bourgeoisie—a domination that is untrammeled by law and based on violence."

The House then voted not to accept the Seymour amendment.

William W. Gibson, of Minnesota, then moved an amendment to the committee's resolution which would have added the words "which means the dictatorship of the proletariat" after the words "Marxism-Leninism" in the resolution. The House rejected this amendment also and then adopted the resolution as presented by the committee.

The House then voted to adopt the Committee's second resolution, which reads as follows:

> BE IT RESOLVED, That Resolution I be referred to all State and Local Bar Associations with the recommendation that they expel from their membership any and every individual who is a member of the Communist Party of the United States or who advocates Marxism-Leninism.
>
> BE IT RESOLVED, That a copy of this report, if approved by the House of Delegates of the American Bar Association, be sent to all State and Local Bar Associations in the United States

for the information of the members thereof.

The second paragraph of this resolution was originally a separate resolution, but on suggestion of Mr. Miller, the House voted to adopt it as part of the committee's second resolution.

Mr. Canfield then moved adoption of the following resolution, which he described as the "meat of our effort":

> BE IT RESOLVED, That the American Bar Association recommend that all State and Local Bar Associations or appropriate authorities immediately commence disciplinary actions of disbarment of all lawyers who are members of the Communist Party of the United States or who advocate Marxism-Leninism.

The House voted to adopt this resolution after it tabled a motion by Mr. Seymour to insert the words "and who have forwarded the objectives of the same" after the words "Communist Party".

The committee's fourth resolution reads as follows:

> BE IT RESOLVED, That the House of Delegates authorize this committee to prepare and distribute among the members of the Association an analysis of the aims, purposes and objectives and practices of communism and Marxism-Leninism as disclosed by the committee's investigation, provided the contents thereof be first approved by the action of the Board of Governors of this Association.

The language quoted above includes an amendment offered by the Board of Governors and accepted by the committee.

W. E. Stanley, of Kansas, objected that there was no report of how much such a pamphlet might cost, and moved that the matter be postponed until a report could be had from the Budget Committee. Cuthbert S. Baldwin, of Louisiana, and Mr. Clark, of New York, both urged that the resolution should be adopted because of the urgency of the problem. Mr. Upton, of the Budget Committee, said that his committee would undertake to see to it that the cost of the pamphlets did not run too high, and Mr. Stanley withdrew his motion.

George L. Wainwright, of Massachusetts, moved that the resolution be amended to include the words "provided the content and cost be approved by the Board". This amendment was rejected by the House.

The committee's resolution was put to a vote and adopted.

Mr. Canfield presented his last resolution, which approved a poll of all members of the Association to determine the identity of members against whom disciplinary action should be taken because of Communist affiliations. He said that the committee was willing to have this resolution rejected but that it was offered should the House wish to adopt it as an open gesture to the public.

Mr. Miller, reporting for the Board of Governors, said that that body opposed the resolution because it would be futile and expensive. Mr. Slaton, of Georgia, also spoke in opposition to the resolution, calling it "unnecessary".

Mr. Provosty, of Louisiana, moved that this resolution and that offered by Frank W. Grinnell, of Massachusetts, dealing with the anti-Communist oath for lawyers, be made a special order of business to be considered together at a later session. In presenting his motion, he told this story: "I don't know whether you recall the story about the time Mr. Tutt had the Chinaman on the stand who was giving him a lot of trouble. He couldn't make the Chinaman tell the truth until he showed up the next day in court with a rooster and an axe and made the Chinaman cut the rooster's head off; that was the only oath that the Chinaman recognized, and from then on he told the truth, and Mr. Tutt won his case." His motion to defer voting on the committee's resolution was carried, and the House recessed at 12:30 P. M. (The action the House took on this last recommendation of the committee is reported *infra* at page 318.)

SECOND SESSION

■ Plans of the Committee on Legal Service to the Armed Forces to meet the contingency of war were reported to the House of Delegates at its second session on Monday afternoon. The report of the Commission To Investigate Organized Crime in Interstate Commerce was presented by its Executive Secretary, Judge Morris Ploscowe in the absence of the Chairman, Robert P. Patterson. The Junior Bar Conference reported on its work among law students and other important programs. Reports were made by the Sections of International Law, Labor Law, Patent Law, and several of the Committees. The House voted to adopt the recommendation of the committee appointed to investigate the matter, that the Association not purchase Salisbury House, Des Moines, Iowa, to use as a headquarters building.

■ The House reconvened at 2:00 P.M. with Chairman Roy E. Willy presiding.

Milton J. Blake, of Colorado, Chairman of the Committee on Legal Service to the Armed Forces, gave the report of that committee. The committee had planned for the contingency of war and thus was able to meet the situation when the Korean campaign began last summer, he said. The committee has completed the revised pamphlet "Important Information for Servicemen", the project has cleared the three Services and is now before the General Counsel of the Department of Defense, he reported. Work is also under way on a revision of the Compendium of Laws, he said. He reported that the committee was also working on other problems created by the current rearmament and recall program.

The next order of business was the report of the Commission To Investigate Organized Crime in Interstate Commerce. By unanimous consent of the House it was presented by Judge Morris Ploscowe of New York, the Executive Secretary of the Commission, in the absence of the

Chairman, Robert P. Patterson. He said that the Commission's work in conjunction with the Kefauver Committee of the Senate had already shown that organized crime was a very definite threat to our system of government. A study of gambling laws is being made, he said, and the preliminary analysis of the Commission was very successful. The problem of organized crime will not be solved by federal action alone, however, he said, since it is essentially a local problem and must be handled locally. He offered the following resolution, which was adopted by the House:

> The American Bar Association expresses its appreciation for the outstanding public service that has been rendered to the nation by the Senate Special Committee to investigate crime in interstate commerce, of which Senator Kefauver is Chairman, in making the public aware of the widespread nature, extent and interstate ramifications of organized crime and the serious threat which organized crime represents to the fundamental concepts of our government.
>
> The Association also urges that a program of action be developed to implement its findings, and pledges its continued cooperation to that end.

Charles H. Burton Reports for Junior Bar Conference

The next report was that of the Junior Bar Conference by the Chairman of the Conference, Charles H. Burton, of the District of Columbia. He reported that the Conference is continuing to emphasize its work among law students and its co-operation with the American Law Student Association; that its work in connection with the public information program has continued in full force, with special emphasis on use of television this year; that the War Readjustment Committee had been reactivated and has endeavored to determine what the deferment policies of the Defense Department are with respect to the various Armed Forces; and that the Conference membership committee had compiled an outstanding record in obtaining new members.

C. W. Tillett, of North Carolina, then reported for the Section of International Law, of which he is chairman. He summarized the conclusions, to date, arrived at by joint action of his Section and the Committee on Peace and Law Through United Nations which has been considering the constitutional aspects of international agreements. The joint committee are in agreement on the following, he said:

(1) With respect to the provision in our Constitution making treaties the supreme law of the land, superseding other federal and state laws, the joint committee are agreed that an international treaty can be successfully safeguarded against being self-executing by the insertion of a clause as follows: "It is expressly stipulated that this treaty is not intended to be self-executing nor to become a part of the domestic law of any of the contracting parties unless implemented by domestic legislation".

(2) An international treaty cannot be safeguarded by a clause in the treaty or by reservation or understanding against the expansion of the limited power of the Federal Congress in the United States to such extent as necessary to fulfill the obligation under the treaty if Congress determines to exercise such power.

(3) Aside from this, the duty of the Federal Government toward other contracting nations for the fulfilment of United States obligations under a treaty and the intent of the United States at the time of execution of a treaty can be restricted by a clause in the treaty stipulating that federal states are not bound by the treaty to cause their legislative authorities to enact any legislation which they could not constitutionally enact in the absence of the treaty and that it is the intention of the parties that the respective constitutional powers of state and federal authorities in federal states should not be deemed to have been affected in any way by the coming into force of the treaty as an international agreement.

Mr. Tillett said that the members of the joint committee were not in agreement as to whether or not the words in Article VI, Clause 2 of the Constitution, viz., "and all treaties made, or which shall be made under the authority of the United States" should be repealed; next, whether or not a constitutional amendment by way of proviso to Article VI should be adopted, specifically providing that no treaty will be permitted to change the Bill of Rights or the basic structure of our government, and whether the relationships of a government with its own citizens, as distinguished from the relationships of a government with nationals of another government or relationships between governments are proper subjects of international negotiation under the treaty clause.

On Mr. Tillett's motion the House then voted to adopt the following resolution:

> RESOLVED, That the joint report of progress in the study of the Constitutional Aspects of International Treaties made by the Committee for Peace and Law Through United Nations and the Section of International and Comparative Law be received, that the joint and separate study be continued and future joint or separate reports be made to the House of Delegates.

Mr. Tillett recalled that the Assembly had passed a resolution calling for a study of the United Nations Charter, with a view to recommending changes, at the Washington meeting. The resolution had been referred by the House to the International Law Section and to the Committee on Peace and Law through United Nations. His Section had considered the matter, Mr. Tillett said, and had taken note of the fact that the U.N. Charter will automatically be reviewed by the member nations in 1955. The Section has appointed a special committee to study the subject and present resolutions when the time comes. He said that one of the committees of the Section was also studying the new consular conventions between the United States and Great Britain, Northern Ireland and Iran, whose texts seem to be departures from the normal form of consular conventions.

Herbert S. Thatcher, of the Dis-

trict of Columbia, Chairman of the Section of Labor Law, reported for that Section. He described the activities of some of the committees of the Section and told the aims of the Section Council.

He then moved adoption of the following recommendations unanimously approved by the Council of the Section:

That there be created immediately a joint sub-committee with equal representation from the Sections of Corporation, Banking and Business Law and Labor Relations Law and the Commerce Committee, for the purpose of drafting legislation embodying the purposes of the foregoing resolution adopted by the House of Delegates with a report to be made at the next meeting of the House of Delegates, together with such minority suggestions as may be necessary. The report of the subcommittee to be returned first for comment and action by the Councils of the several sections involved.

That the American Bar Association approve the Bill to amend the National Labor Relations Act, as amended, to provide for improved procedures of the National Labor Relations Board and to expedite its disposition of cases, copy of which is attached to the report of the Section of Labor Relations Law submitted to the House of Delegates at the current mid-year meeting.

Mr. Thatcher explained that the Section of Corporation, Banking and Business Law had drawn a statute covering this subject matter, but that his Section had not approved it because their proposal was a "shotgun" approach to the problem. If any legislation is to be proposed, he said, his Section feels that it should attempt to specify the particular manner in which restriction is to be imposed on the activities of labor unions. The recommendation of the Corporation Section would be used as the basis for further study and report by the joint committee of the two Sections and the committee. The House voted to adopt these recommendations.

Mr. Thatcher also reported that the Labor Section had prepared legislation dealing with procedural reforms under the National Labor Relations Act. The purpose, he said, is to expedite the work of the National Labor Relations Board.

Section of Patent Law Proposes Seven Resolutions

Jennings Bailey, Jr., of the District of Columbia, Chairman of the Section of Patent, Trade-Mark and Copyright Law, reported for his Section. Upon his motion, the House voted to approve a change in the by-laws of the Section changing the time of its annual meeting. The change, which is to Section 1 of Article VII, was desired so that Section members will be able to attend general Association functions after the Section sessions are completed without unduly prolonging their stay.

Mr. Bailey then presented seven resolutions to the House, all of which were adopted. The text of the resolutions and a brief summary of Mr. Bailey's explanation of them follows:

I

RESOLVED, That the Association oppose a statutory requirement that any governmental contract for scientific and technological research and development work include a provision that any patents which may result from work under such contracts shall be assigned to the United States; and oppose any statutory requirement for provisions with respect to patents which do not leave the matter of patent rights resulting from such work open for arm's-length negotiation in each individual case. Specifically, the Association disapproves H.R. 5663, H.R. 5721, H.R. 5796, H.R. 5885, H.R. 5733, and H.R. 5869, to the extent above indicated.

That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

The bills referred to contain extensive provisions for Government aid to small business. The provisions felt to be undesirable would make it mandatory for governmental agencies to require assignment to the United States of all patents on inventions developed under research or development contracts with the government. The Section feels that this type of provision would discourage research and that the Government has no need of full title to such patents. The bulk of the legislation is beyond the scope of the Patent Section and no action was asked except as to the patent provisions.

II

RESOLVED, That it is the sense of this Association that the present provision in the Atomic Energy Commission patent clauses that "the Commission shall have the sole power to determine whether or not and where a patent application shall be filed" be revised to permit a contractor to file a patent application in the United States for an invention or discovery other than "any invention or discovery which is useful solely in the production of fissionable material or in the utilization of fissionable material or atomic energy for a military weapon" without first obtaining the consent or approval of the Atomic Energy Commission.

That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

The Section felt that there was no reason why the contractor should not be allowed to file for patents in this field since the Atomic Energy Commission can immediately request the Patent Office to issue a secrecy order if the material in the patent should not be disclosed.

III

RESOLVED, That it is the sense of this Association that the present Atomic Energy Commission patent clause providing that "the Commission shall have the sole power. . . . to determine the disposition of the title to and rights under any application or patent that may result" be disapproved.

That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

The Section disapproved the power of the Commission here for the reasons stated in regard of number II.

IV

RESOLVED, That it is the sense of this Association that the Atomic Energy Commission patent clause provision, whereby a contractor is required to indemnify the Government in procurement contracts (1) as to infringement of patents covering processes utilized by the Government or (2) as to infringement of patents covering combinations including a device or

material other than the contract device or material, be disapproved.

That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

Mr. Bailey explained that it was felt that the indemnity provision was unfair and inconsistent with the rule, sponsored by the Department of Justice and adopted by the courts, that the owner of a patent on a process has no right to control the sale of unpatented materials even if intended for use in the process.

V

RESOLVED, That it is the sense of this Association that any practice, whereby a free license is requested by the Government covering devices or material to be furnished under Government specification with the implication that if no such license be granted the patented device or material will not be included in the specifications for the purchased device, or material, be disapproved as detrimental to the patent system.

That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

The practice of obtaining a free license is not necessary in order for the Government to obtain the device, Mr. Bailey said, and it does undoubtedly discourage private research in connection with apparatus or material of which the Government would be the principal user.

VI

RESOLVED, That the Association disapproves in principle any practice by which the Government would apply for or acquire patents issued by foreign countries.

More specifically, the Association disapproves the instructions preceding paragraph 9-107.4 Armed Services Procurement Regulations, Section IX, Patents and Copyrights, that the government departments "shall whenever practicable, acquire the right to file foreign patent applications" in research and development contracts.

That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

The Government has nothing to gain, Mr. Bailey said, by obtaining a patent in a foreign country that would debar the citizens of that country from using an invention developed there. Such a policy would only irritate friendly powers and prove ineffective as to enemy powers.

VII

RESOLVED, That the American Bar Association approves the creation of the Patent Research and Educational Foundation which has been established in the George Washington University and undertakes to assist in all practical ways in the operation of said foundation.

That specifically, we recognize:

1. That the patent laws enacted pursuant to the Constitutional provision authorizing Congress to promote the progress of science and the useful arts, by securing for limited times to . . . inventors the *exclusive* right to their . . . discoveries (Constitution, Article I, section 8) have furnished the incentive for making, disclosing and developing new discoveries which have materially promoted science, arts and industry and have increased the public health and safety and furnished the basis for the creation by private initiative, enterprise and capital, of new enterprises and the expansion of old ones and the raising of the standard of living for all the people;

2. That continued industrial progress in the United States as well as our national security require that our patent system shall be preserved and that public confidence in the protective security afforded by patents shall remain unimpaired, by insuring that the natural property right inventors have in their discoveries shall be made exclusive in fact;

3. That there is a need for collecting and keeping current a pool of factual information not otherwise obtainable concerning the patent system, patents and the place they occupy in our economy;

4. That it is necessary that we maintain at all times an informed public support of the patent system;

5. That such support can best be obtained by the advancement and wide diffusion of accurate knowledge and information concerning the patent system and patents, and that such knowledge and information should originate from a source which is competent, independent, free from bias and influence;

6. That a university of recognized standing that specializes in training young men and women in patent law and procedure and in the related trade regulation courses dealing with trade practices and the federal anti-trust laws, may best meet these requirements;

7. That the George Washington University, because of its location in the national capital, its patent traditions and its long experience in training patent lawyers and in public relations, is suitable and appropriate as a place of origin of such knowledge and information.

It is felt, the Chairman said, that such a foundation would fill a definite need for education through improved public relations with respect to the patent system.

Committee Recommends Salisbury House Be Not Purchased

The House then turned to consideration of the report of the Committee To Investigate the Advisability of Purchasing Salisbury House, Des Moines, Iowa, presented by James R. Morford, of Delaware, chairman of the committee. Mr. Morford, reminded the members that Salisbury House had been offered to the Association as a permanent headquarters building, and that his committee had been appointed at the Washington Meeting to consider the matter. The committee had visited Des Moines, he said, and had inspected the building and grounds thoroughly. After long and serious debate, it had decided, by a vote of 18 to 11, to recommend the following:

RESOLVED, That the Committee recommend to the House of Delegates that Salisbury House be not purchased.

The opinion of the majority of the committee was that Salisbury House had neither the quality nor the character of constituting a shrine or a monument to the legal profession or to the Association: that, while it could be used for offices, it does not have and would never have practical utility for all purposes that would be desirable in a permanent headquarters building; that there would be a high cost of maintenance because of a large amount of unusable space; that moving from Chicago to Des Moines would disorganize the functioning of the Association's business; and that the transportation to and from Des Moines had serious disadvantages.

Mr. Morford then moved that the recommendation of the committee be adopted.

The House then debated the proposal; W. E. Stanley, of Kansas, and Harold J. Gallagher, of New York, spoke against the resolution of the committee and in favor of purchase of Salisbury House, while William Logan Martin, of Alabama, and Loyd Wright, of California, spoke against the purchase. The House voted to adopt the recommendation of the Committee, and the proposal to purchase Salisbury House was defeated.

W. E. Stanley, of Kansas, Chairman of the Committee on Ways and Means, then gave his report. He said that a proposal to increase the dues of members of the Association had been referred to the Ways and Means Committee at the last Annual Meeting. The committee went into the matter thoroughly, he continued, and the Board of Governors also reconsidered the matter and has asked the postponement of consideration.

He then moved that the following recommendation be approved:

> That it be the declared policy of the American Bar Association to bring into its membership at least a majority of the practicing lawyers of the United States; that the accomplishment of this purpose be made a primary activity, and that the President, the Board of Governors, and the Membership Committee take such steps as may be necessary, on a continuing basis, to accomplish this purpose.
>
> That the President and Board of Governors of the Association are directed to carry forward a campaign, on a continuing basis, to induce the members of the Association to become either sustaining or patron members.

The House voted to adopt the recommendations without debate.

Mr. Stanley then proposed the following recommendation, explaining that the dues of new members are presently prorated quarterly, which leads to confusion and unnecessary work in the Headquarters office.

> That the present pro-ration of dues of new members "computed on a quarterly basis", as provided in Section 2 of Article II of the By-Laws, should be changed to provide for pro-rating on a semi-annual basis, and that the Committee on Rules and Calendar be requested to present an appropriate amendment to accomplish such change;

The House voted to approve the recommendation.

The last recommendation of the Committee on Ways and Means was as follows:

> That the Board of Governors be directed to make provision for patron memberships for firms upon payment of $250.00 annually, the names of such firms to be published, as patron members, in the annual membership roll.

Mr. Stanley said that there was no reason why firms, as such, could not participate in financing the activities of the Association, and that the proposal would increase the income without imposing too big a load on individual members.

Floyd E. Thompson, of Illinois, asked if it were not unethical for firm names to be published as patron members on the rolls of the Association. Mr. Stanley replied that it was not advertising but merely recognition that the firms were participating in the active work of the Association. Robert W. Upton, of New Hampshire, said that only the House had power to determine qualifications for patron members and fix the dues for that class of membership. The recommendation is beyond the power of the Board of Governors, he said. Mr. Stanley conceded that Mr. Upton was right and amended his motion to adopt the recommendation so as to refer the matter to the Committee on Rules and Calendar. The motion carried, and the matter was referred.

Upon motion of Secretary Stecher, the House voted to postpone consideration of increasing dues until the Annual Meeting.

W. J. Jameson, of Montana, reporting for the Committee on Scope and Correlation of Work, said that he had three recommendations, the first of which was as follows:

> That there be added to the Association's continuous, long-range program as meriting special emphasis, the program of Minimum Standards of Judicial Administration.

Mr. Jameson said that the House of Delegates had adopted a recommendation of his committee at the Washington meeting that the Association endorse and emphasize, in particular, the program of the Committees on American Citizenship, Legal Aid, and Lawyers' Reference Service. At the same meeting, a resolution was adopted pledging support to the Program of the Minimum Standards of Judicial Administration. The present resolution was offered so as to emphasize the importance of the latter by including it among the others. On his motion, the House voted to adopt the recommendation.

The committee's second resolution was as follows:

> That the special Committee on Legal Aspects of National Security be abolished at the close of the current Association year.

The abolition of this committee was recommended by the committee itself at the Washington meeting, Mr. Jameson said, because the legal aspects of national security affect so many different problems that they cannot very well be solved by a special committee. It was felt that responsibility for these problems should be distributed among existing agencies or that a standing committee with greater membership should be appointed. The Committee on Scope and Correlation is studying all committees relating to the Armed Forces and national defense and expects to report on that subject at the next Annual Meeting, he said. The House voted to adopt the resolution abolishing the Committee on Legal Aspects of National Security.

The third resolution proposed by Mr. Jameson for his committee was this:

> That all matters of public relations should be centered in the Standing Committee on Public Relations and that any question of public relations should clear through that Committee; and
>
> That, insofar as the mass media, namely, the press, radio, television, comic strips, movies, and the theater, involve the portrayal to the public of the lawyer and the administration of justice, the public relations of the legal profession are clearly involved and the subject matter is within the jurisdiction of the Association and

should be vested in its Standing Committee on Public Relations; that if, in the opinion of such Committee, additional personnel is needed in order to establish effective contacts with the mass media, then the Committee should request the President of the Association to appoint an Advisory Committee of such number of members as will supply the necessary personnel.

Mr. Jameson said that centering all matters relating to public relations in the Public Relations Committee was felt to be the only way the Association could have an effective program of public relations. The House voted to approve the recommendation.

James R. Morford, of Delaware, Chairman of the Committee on Membership, reported to the House for his committee. He said that the remedy for the problems of the Association could be solved by increased membership. He said that only 43,000 lawyers out of 190,000 in the United States were members of the Association, which means a potential of tremendous expansion. What is needed is an intelligent plan, extending over a period of years, to secure new members. The committee has been considering ways of doing this, but it may take some time to find the proper technique, for methods that may be successful in one community may not work at all in another. One of the problems being considered was what to do about the 1800 members lost each year through nonpayment of dues, he declared. He called attention to the new symbol in front of the name of each member of the Association in the Martindale-Hubbell Directory, and said that it was expected that the psychological effect of that might bring in some new members. He also mentioned the "every member get a member" campaign in the JOURNAL, starting with the January, 1951, issue. The committee is working on plans to have membership campaigns in twelve or thirteen states each year, changing the states canvassed annually until the whole country has been covered. He called for suggestions and help from each member of the House, and said that the goal was to double the size of American Bar Association.

Cody Fowler, of Florida, President of the Association and *ex-officio* chairman of the Committee on Lawyers in the Armed Forces reported for that committee. He recalled the former attitude of the Armed Forces that "lawyers are a dime a dozen", and said that it was the job of his committee to prevent this attitude from arising in the present conflict, since it was not in the best interest of the services to ignore legally trained men. His committee has discussed the question with the Defense Department, and the Forces have agreed to use lawyers in places where they will be most valuable—either in legal jobs or in positions that lawyers, because of their legal training, can handle better than those trained otherwise.

The House then recessed at 4:50 P. M.

THIRD SESSION

■ At this session, the House voted to reaffirm the Association's policy calling for an anti-Communist oath for members of the Bar. This was the climax of a controversy that began with the adoption at the Washington meeting of a resolution recommending such an oath. Several members later expressed opposition, and the debate over a resolution introduced at this meeting by Frank W. Grinnell, of Massachusetts, calling for rescission of the previous policy, was perhaps the most lively and interesting of the entire meeting. The House also adopted four resolutions offered by the Committee on Jurisprudence and Law Reform, two by the Section of Legal Education and Admissions to the Bar, one by the Section of Labor Law, and two introduced by individual members.

■ The final session of the House convened at 10:10 A. M. on February 27, Chairman Roy E. Willy presiding.

Mr. Willy announced that the State Delegates had nominated the following for offices in the Association for the year 1951-1952:

For President—Howard L. Barkdull, of Ohio

For Secretary—Joseph D. Stecher, of Ohio

For Treasurer—Harold H. Bredell, of Indiana

For Members of the Board of Governors:

First Circuit—Allan H. W. Higgins, of Massachusetts

Second Circuit—Cyril Coleman, of Connecticut

Sixth Circuit—Donald A. Finkbeiner, of Ohio

Tenth Circuit—Ross L. Malone, Jr., of New Mexico

Judge Orie L. Phillips, of Colorado, then reported for the Survey of the Legal Profession. He said that the Survey had entered its final year of research—unfinished reports are well under way and the Council has fixed a deadline of September. He mentioned some of the reports that were now being completed and stated that the cost of the Survey so far had exceeded the initial $150,000 grant. The Carnegie Endowment had supplied another $75,000, he said, and an additional $50,000 had been supplied by the Association and the American Bar Association Endowment. The ambition of the Survey is to produce a final report that may help make clearer to the American people the essential part which the legal profession must play in the world if we are to continue to enjoy order, liberty and individual freedom under law, he said.

Sylvester C. Smith, Jr., of New Jersey, then reported the death of George W. C. McCarter, in a railroad accident. Mr. McCarter had been a member of the House for a number of years. Mr. Smith said: "Mr. McCarter was a distinguished lawyer and the son of a great lawyer in New Jersey. He was active in practice ... We of the New Jersey Bar feel that we have suffered—and the public has suffered—a great loss in this outstanding man's death. His interest in bar associations, his attendance in the sessions of this House, and his services, I know will be missed. I know that we all feel great regret in the tragic, early death of this man."

The Chairman of the House then

recognized Mr. Canfield, of the District of Columbia, to conclude the report of his Committee To Study Communist Tactics and Objectives, which had been held over as a special order of business to be considered along with the resolution of Frank W. Grinnell, of Massachusetts, dealing with the proposed anti-Communist oath for lawyers. The remaining resolution of the Committee To Study Communist Tactics called for a poll of members of the Association to determine whether any were Communists, and Mr. Grinnell's resolution called for rescission of the resolution, passed at the Washington meeting, calling upon the states to require an anti-Communist oath of members of the Bar "within a reasonable time and periodically thereafter". (The full account of the details of the resolution passed at the Washington meeting and of opposition to it appears in the February issue of the JOURNAL.)

Mr. Grinnell spoke first, urging the House to reconsider its stand on the oath. He said that the repetition of oaths would weaken the solemn professional oath of the profession; that all members of the Bar have sworn to support the Constitution and that an anti-Communist oath is therefore superfluous; that the question has already split the American Bar, since lawyers in both Massachusetts and New York have voted disapproval of it; and he concluded by urging adoption of his resolution: "I ask you, gentlemen, without desiring to interfere with any movement against disorganizing this Government, as undertaking to represent the American Bar, to rescind this vote, to stand on what you did yesterday [meaning the resolutions sponsored by Mr. Canfield's committee providing for expulsion of Communists from the Association, and recommending disbarment of Communists] and leave the subject of inquisition alone."

Charles S. Rhyne, of the District of Columbia, reporting for the Draft Committee on Mr. Grinnell's resolution, moved that the resolution be referred to Mr. Canfield's Committee To Study Communist Tactics and Objectives.

Robert G. Storey, of Texas, one of the original sponsors of the resolution to require an oath, said that many lawyers had taken their professional oaths years before Communism was an issue and that it was therefore not inappropriate that lawyers again attest their loyalty; that there were Communists in the legal profession, although their number was very small; that Hitler had come to power because an organized, radical, minority few had got control; that the first thing the Communists did on taking over in Bulgaria was to abolish the legal profession; that "We are in a global conflict, not of capitalism against communism, but of liberty and freedom against oppression and tyranny, and the public is looking to us, as lawyers, to lead."

W. E. Stanley, of Kansas, said that the Association should not now attempt to rescind its action; that the oaths will create renewed confidence in the minds of the public in the legal profession; that the lawyers who defended the Communists on trial in New York had used every effort to destroy the administration of justice; that the members of the House should not have to hang their heads when people ask "Why, when we are trying to defend ourselves against communism, does the American Bar Association try to cover up for its membership by going back to an oath taken years ago—because they are afraid to have them stand up and be counted now as to whether or not they are now members of the Communist Party?"

Ross L. Malone, Jr., of New Mexico, said that he thought that the interest of the Association and the legal profession will be best served by a rescission of the action taken at the Washington meeting; that the Association should not take the position of asking the state associations to do something that the House has been unwilling to do or to ask members of the Association to do. "The thing that will defeat Communism in the legal profession is the action that we took yesterday, the disbarment; the active initiation by the State Associations of disbarment proceedings against their lawyers who are members of the Communist Party. That will tell the people of the United States where the legal profession stands", said Mr. Malone. He added that he felt that the signing, or failure to sign, of an annual repetitious oath would accomplish nothing to that end.

William C. Walsh, of Maryland, said that to rescind the resolution calling for the oath would be to stultify the stand taken against Communism in adopting the Canfield report; that without the proposed oath, the Association would be in the position of having called for disbarment of Communists but of not offering any plan or method for doing so; that the Bar should not favor an oath for teachers and labor leaders and federal employees, yet be unwilling to support oaths for lawyers.

Walter Chandler, of Tennessee, said that to say that lawyers should not take an anti-Communist oath would be to disapprove of an oath for other professions and trades. He recalled that when he was in Congress, many lawyers testified before the House Judiciary Committee, some of whom were Communists, a fact unknown to members of the Committee. "How can we find out which are the sheep and which are the goats if we are not going to have some method of doing it?" he demanded. He called Mr. Grinnell's policy "a continuation of the old laissez-faire idea that things of this kind which are not sound will die a natural death." That is untrue, he said. "They will not die a natural death. The old doctrine that every dog is entitled to his first bite does not apply to a snake. No snake is entitled to his first bite."

P. Warren Green, of Delaware, said that he was against the motion to refer because he wanted to have the Grinnell proposal defeated. The question of rescission of the Association's stand on the oath had been in all the papers, he remarked. "Can

you envision a headline not only in our local papers or papers throughout this country, but also throughout the Soviet and satellite-controlled countries, that the American Bar Association has rescinded its action to require an oath of lawyers against communism?" he asked.

Mr. Canfield, speaking for his committee, said that his committee had discussed the substance of Mr. Grinnell's resolution and that it did not want to have the matter referred to it. The question should be debated and settled on the floor of the House, he said, for the committee had no power to settle the matter.

Mr. Rhyne, speaking for the Committee on Draft, then withdrew his motion to refer the resolution and reported that the committee recommended rejection of the Grinnell resolution and adherence to the original position of the Association.

Charles Ruzicka, of Maryland, moved that there be a roll call vote on the question of rescission. The motion was put to a vote and lost.

House Votes To Affirm Stand on Anti-Communist Oath

The House then voted to affirm the stand taken at Washington and to reject the Grinnell resolution.

The House also voted not to adopt the fifth resolution of Mr. Canfield's committee. This resolution would have called for a poll of members of the Association on the question of membership in the Communist Party. Comment on the floor showed that the members felt that such a poll would be expensive and would serve no useful purpose, since many lawyers would ignore the questionnaire and Communist members would not answer truthfully.

Alfred J. Schweppe, of Washington, then reported briefly for the Committee on Peace and Law Through United Nations, of which he is chairman.

Leonard D. Adkins Reports for Jurisprudence Committee

The report of the Committee on Jurisprudence and Law Reform was presented by the chairman of the committee, Leonard D. Adkins, of New York. His first three resolutions dealt with the selection and qualifications of federal jurors and were passed by the House without debate. The resolutions are as follows:

I

RESOLVED, That the American Bar Association approves the submission to Congress and the enactment into law of a bill to provide for a jury commission for each United States District Court, to regulate its compensation and prescribe its duties, substantially in the form approved by the Section on Judicial Administration of the American Bar Association and by a Committee of the National Judicial Conference;

RESOLVED, That the Standing Committee on Jurisprudence and Law Reform be authorized to advocate the introduction and passage of such a bill in the Congress of the United States by all appropriate means.

II

RESOLVED, That the American Bar Association disapproves and opposes the enactment into law of House Bill 293 in the Eighty-second Congress entitled in part, "A Bill to amend and re-enact Sections 1861 and 1862 of Title 28, United States Code • • • • to authorize the judges of the district courts to appoint two jury commissioners • • •" and directs the Standing Committee on Jurisprudence and Law Reform to oppose its passage by all appropriate means.

III

RESOLVED, That the American Bar Association disapproves and opposes the enactment into law of Senate Bill 19 in the Eighty-second Congress entitled, "A Bill to establish uniform qualifications for jurors in the Federal courts" and directs the Standing Committee on Jurisprudence and Law Reform to oppose its passage by all appropriate means.

The fourth resolution of the committee dealt with a bill introduced by Congressman Celler authorizing the Supreme Court to lay down a code of ethics for all lawyers practicing in the federal courts. Mr. Adkins said that it was felt that it was unwise to have two codes of ethics, one promulgated by the bar associations and the other by the Court. His resolution would, therefore, urge that the bill be limited to a code for the conduct of lawyers in the federal courts.

Secretary Stecher said that the House had gone on record as favoring such legislation in 1949.

There was debate on the proposed resolution, Floyd E. Thompson, of Illinois, declaring that it was "fundamentally unsound" and that the Association should not support any measure that would imply that the legislature, rather than the court, was the proper body to regulate the practice and conduct of lawyers. He moved to amend the resolution to eliminate the possibility of such a construction of its language. James E. Palmer, Jr., of the District of Columbia, said that he was opposed to the amendment because it might mean direct reversal of the action taken by the House in 1949. George Maurice Morris, of the District of Columbia, moved that the resolution be rereferred to the committee, with direction to confer with the proponents of the bill now proposed to the Congress.

A motion by Sidney Teiser, of Oregon, to lay the resolution on the table was defeated. Mr. Morris' motion to rerefer to the committee was carried.

The fifth resolution of the committee expressed opposition to a bill introduced in Congress authorizing the Chief Justice of the United States to assign circuit judges to sit temporarily on the Supreme Court in place of any Justice who is unable to serve. Mr. Morris inquired whether the Section of Judicial Administration had considered the resolution, and, when informed that it had not, moved that the resolution be referred back to the committee with instructions to confer with the Section. This motion was carried.

The sixth resolution was as follows:

RESOLVED, That the American Bar Association disapproves and opposes the enactment into law of H. R. 270 in the Eighty-second Congress entitled "A Bill to amend Section 1404 of Title 28, United States Code, with respect to transfer of certain civil actions from one district to another" and directs the Standing Committee on Jurisprudence and Law Reform to oppose its passage by all appropriate means.

There was debate on this resolu-

tion, Jennings Bailey, Jr., of the District of Columbia, Alfred P. Murrah, of Oklahoma, and Fulton B. Flick, of Pennsylvania, suggesting that it be referred so that the Section of Judicial Administration and the Section of Patent, Trade-Mark and Copyright Law might consider it; and Mr. Thompson, of Illinois, and Mr. Stanley, of Kansas, declaring that the House should not delay action. The House voted to adopt the resolution.

John D. Randall, of Iowa, then reported for the Committee on Unauthorized Practice of the Law. He described some of the work of his committee, and then presented a Statement of Principles drawn up by the National Conference Group of Lawyers and Accountants. The House voted to approve the Statement.

Orison S. Marden, of New York, Chairman of the Committee on Legal Aid Work, gave the report of that committee. He said that the number of legal aid units has increased over 60 per cent in the last six years. Legal aid is the answer to socialized law, he declared, and its success will preserve the independence of the profession. He called upon the members of the House to help make the program a success in their own communities.

House Honors Memory of Robert R. Milam

Harold J. Gallagher, of New York, immediate Past President of the Association, then requested the House to record its deep sense of loss over the death of Robert R. Milam, of Florida. Mr. Gallagher recalled Mr. Milam in these words: "His death was sudden, tragic and unexpected. He had met the day before with the House, and you all remember his genial disposition, his great interest in the work of the Bar Association, and his unfailing loyalty to the cause of every issue and every question that involved the good faith and credit of the American lawyer." On Mr. Gallagher's motion, the House rose out of respect to the memory of Mr. Milam.

On motion of Sylvester C. Smith, Jr., of New Jersey, the House also rose out of respect to the memory of the late Mr. McCarter, of New Jersey.

William M. Wherry, of New York, then reported for the Committee on Lawyers' Reference Service. He said that there were sixty-six Lawyer Reference Plans either in active operation or authorized, located in places as large as Boston and Brooklyn and as small as Maplewood and Kalamazoo. They have had an enthusiastic reception from the public, he said, and the objections to them have proved to be unreal.

Anne X. Alpern, of Pennsylvania, reported for the Section of Municipal Law. She said that the Section was very active and had completed a comprehensive study of water, sewerage rates and rate structures in various cities. Traffic problems have also been under consideration, she said. She called attention to the new publication of the Section—the *News Letter*.

Richard Bentley, of Illinois, Chairman of the Section of Legal Education and Admissions to the Bar, reported that in December, 1950, the Association of American Law Schools adopted the new standard for the approval of law schools which adopted the so-called three year pre-legal college rule. This standard had already been adopted by the House. He presented the following resolutions for his Section, both of which were adopted without debate:

> WHEREAS, The School of Law of St. Mary's University of San Antonio, Texas, was given provisional approval by the American Bar Association in February, 1948, and that school has continued since then and is now in full compliance with the standards of the American Bar Association; therefore be it
>
> RESOLVED, That the American Bar Association grants full approval to the School of Law of St. Mary's University of San Antonio, Texas.

> WHEREAS, Application for provisional approval by the American Bar Association has been made by the School of Law of Gonzaga University of Spokane, Washington, and an investigation of the school shows that it is in compliance with at least the minimum standards of the American Bar Association, therefore be it
>
> RESOLVED, That the American Bar Association provisionally approves, subject to annual inspection until full approval be given, the School of Law of Gonzaga University of Spokane, Washington.

Arnold W. Knauth, of New York, reporting for the Committee on Admiralty and Maritime Law, moved the adoption of a resolution that the Association requests the Judicial Conference and the Chief Justice to refrain from action on a proposed Rule 58, providing that the present customary and local-rule admiralty practice would be replaced by a general reference to the F. R. C. P., until full consideration of such proposed change has been given by both bench and bar. This resolution was withdrawn in view of a letter from the Chief Justice assuring the Committee that such a hearing would be given.

Mr. Knauth then moved the adoption of a resolution asking the Chief Justice to promulgate and send to the Congress a rule correcting the inadvertent repeal of Section 876 of the Revised Statutes which allowed subpoenas in admiralty cases to run for one hundred miles from a point where the court is sitting, as is the practice in all other civil cases under the Rules.

This resolution was adopted without debate.

Mr. Knauth further moved the adoption of a resolution asking the Chief Justice to promulgate a General Admiralty rule, derived from the text of F. R. C. P. 26 and 32, providing that in admiralty cases depositions for discovery may be taken in substantially the same manner as in other civil cases.

This resolution also was adopted without debate.

Clif Langsdale, of Missouri, speaking for the Section of Labor Law, moved the following resolution, inadvertently omitted from the report of the Section earlier in the meeting:

> RESOLVED, That the American Bar Association approves the bill to amend the National Labor Relations Act, as amended, to provide for improved procedures of the National Labor Re-

lations Board and to expedite its disposition of cases, copy of which is attached to the report of the Section of Labor Relations Law, submitted in the House of Delegates in the current Mid-Year Meeting.

The House voted to adopt the resolution.

Allen L. Oliver, of Missouri, Chairman of the Committee on Unemployment and Social Security, asked the members of the House to study a new bill dealing with social security, H. R. 525.

The Section Delegate of the Section of Criminal Law, John R. Snively, of Illinois, reported briefly for his Section.

Reporting for the Committee on Public Relations, Thomas L. Sidlo, of Ohio, said that in the past many efforts have been made to formulate and give effect to a public relations program, but they have always failed to command support. Accordingly, his committee is restudying the whole problem to avoid another abortive effort. The committee has several projects under way, which he mentioned briefly, saying that the committee's full report had been filed with the Secretary and would be sent to members of the House.

Charles S. Rhyne, of the District of Columbia, Chairman of the Committee on Draft, reported on the three remaining resolutions submitted to his committee at the beginning of the meeting. The first, which follows, was submitted by Edwin M. Otterbourg, of New York. On Mr. Rhyne's motion, the resolution was adopted:

RESOLVED, That the American Bar Association declares that the essential rights of the public to due process of law in connection with the operation of federal administrative agencies require all the reasonable safeguards and protections provided by the Administrative Procedure Act of 1946 which was enacted largely through the efforts of this Association, and

RESOLVED FURTHER, That Section 305 of the recently enacted Federal Civil Defense Act of 1950 which provides in substance that whenever the President declares a "civil defense emergency" the Administrative Procedure Act shall be practically suspended, threatens without justification the fundamental rights of our people and that, therefore, this Association favors and supports an immediate amendment to the said Civil Defense Act of 1950 repealing said Section 305.

The second resolution, submitted by John R. Snively, of Illinois, called for the banning of punch boards from interstate commerce. Mr. Rhyne, speaking for his committee, moved that it be referred to the Committee on Organized Crime in Interstate Commerce.

Mr. Snively, speaking in opposition to the motion to refer, declared that the attention of the nation had been focussed on organized crime and that gambling devices had been banned from interstate commerce by a new federal law. The term "gambling devices" in the act, however, does not include punch boards, he said. There is no reason for delaying action on the question, he declared.

The House voted to refer to the Committee on Organized Crime as recommended by Mr. Rhyne.

The final resolution presented by Mr. Rhyne, was proposed by James E. Palmer, Jr., of the District of Columbia. Mr. Rhyne said that it had the support of the Section of Real Property, Probate and Trust Law and upon his motion it was adopted. It reads as follows:

RESOLVED, That the Association disapproves in principle the authority of the Federal Government to requisition real property as authorized by the Defense Production Act of 1950 and recommends that Title II of the Act be amended to abolish the right to requisition "facilities", including real estate, and that in lieu thereof the United States be empowered to acquire by purchase, condemnation or otherwise both realty and personalty in connection with the Defense Production program, with the right of immediate possession upon the filing of condemnation proceedings whenever necessary in an emergency as provided for in World War II.

Burt J. Thompson, of Iowa, Chairman of the Committee on Regional Conventions, reported to the House on the regional meetings to be held in Atlanta, Georgia, and Dallas, Texas, this spring. Details of those meetings were reported in the February and March issues of the JOURNAL and elsewhere in this issue.

The House then adjourned *sine die* at 1:30 P.M.

Agreement Ends Litigation

(Continued from page 283)

the will and the time of such discussion changes have taken place in the affairs of the customer, in the reasons for various of the provisions made in his will and in the law applicable to his situation, with the result that the will may require revision. If the trust institution were to comment to the customer upon his will in the absence of the lawyer who drew the will, the lawyer may feel that such comment, coming in the light of changed circumstances, might be interpreted as criticism of his work and prejudice his relations to his client. At the same time the trust institution should not be expected to forego all discussion with the customer merely because the latter has a will. However, in observance of the professional relationship between the lawyer and his client, the trust institution, in all instances where the lawyer who drew the will is available, shall refrain from discussing the provisions of the will until the matter can be taken up with the lawyer, unless the customer shall definitely state that his relations with such lawyer have been terminated. In any instances where the relationship of such lawyer has not been terminated, the trust institution may discuss the provisions of such will with its customer only (a) either with the approval of such lawyer, or (b) following the expiration of seven days after it has mailed a letter to the lawyer inviting him to participate in such discussions.

4. To the extent that the trust institution may have preliminary discussions with its customer regarding any will or instrument of trust serving purposes similar to those of a will, such discussions shall not undertake to resolve decisions or determine a course of action to be taken by the customer, but all such matters shall be reserved for determination by the customer with advice from his attorney. However, the trust institution following such discussions may prepare for the customer's attorney a memorandum thereof, factual in nature, which shall be given to the customer's attorney and with the attorney's consent to his client.

5. A trust institution shall not prepare for its customer or prospective customer any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or instruments constituting outlines thereof. Nothing herein contained shall prohibit the trust institution, following its preliminary discussions with its customer, from conferring or co-operating with the customer's attorney in preparing any legal document, if such attorney is not, directly or indirectly, in the employ of the trust institution.

6. The trust institution will not, in the interest of procuring its designation as executor or trustee, recommend or suggest to its customer that the latter forego the naming of an individual coexecutor or cotrustee.

7. The execution and attestation of a will or trust instrument serving purposes similar to a will shall be under the supervision of the lawyer who drafted the document.

8. In all legal matters involved in the administration of estates and trusts the trust institution shall employ, or if acting jointly with a coexecutor or cotrustee shall recommend the employment of, the testator's or donor's or family's lawyer in all instances where such lawyer is available, unless there are compelling reasons to the contrary such as disqualification because of interest or disability. The trust institution shall not recommend or suggest to its customer that he forego including in his proposed will or trust a recommendation that the fiduciary employ the customer's lawyer to perform the legal services arising thereunder.

IN WITNESS WHEREOF the parties hereto have duly executed this agreement the day and year first above written.

FIRST NATIONAL BANK OF MINNEAPOLIS
H. E. Atwood, President
NORTHWESTERN NATIONAL BANK OF MINNEAPOLIS
Clarence R. Chaney, Vice Chairman of the Board of Directors
HENNEPIN COUNTY BAR ASSOCIATION
Daniel F. Foley, President

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from Association members any manuscript, material or suggestions of items for consideration for publication. With our limited space we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be published; exceptions are sometimes made as to solicited contributions. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

Manuscripts must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet this requirement.

As the work of the Board of Editors is carried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done. Because of the small size of the JOURNAL staff, unsolicited manuscripts cannot always be immediately acknowledged, although every effort will be made to do so. A period of four or more weeks is usually required for consideration of material; some manuscripts may require more time for consideration because of the nature of their subject matter.

Celler Anti-Merger Act

(Continued from page 256)

the case of *International Shoe Company* v. *Federal Trade Commission, supra,* decided January 26, 1930, the International Shoe Co., having a nation-wide business, purchased the stock of McElwain Co., a smaller shoe company also having a nation-wide business. As to a part of the business of the two corporations, they were not in direct competition. The Federal Trade Commission sought to order a divestiture of the stock and prevent the merger. The Supreme Court held that the merger was not of sufficient size or importance, even though there was some competition between the two corporations, to substantially lessen competition or to create a monopoly. The Court has this to say:

"Mere acquisition by one corporation of the stock of a competitor even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.* (258 U. S. 346, 357); that is to say, to such a degree as will injuriously affect the public.

"The language in the amendment it will be noted follows closely the purpose of the Clayton Act as defined by the Supreme Court in the International Shoe Case."[23]

In the previous Congress, the Report from the House Judiciary Committee favoring the Kefauver Bill, which was the predecessor of the Celler Bill, contained several of the identical paragraphs above quoted, and also stated:[24]

See also *Federal Trade Commission* v. *Sinclair Co.* (261 U. S. 463).

The Second Circuit Court of Appeals in the case of *Temple Anthracite Coal Co.* v. *Federal Trade Commission* (51 Fed. (2d) 656), in a case where one coal company had purchased several others in Kentucky, held that Section 7 of the Clayton Act was not involved, and cited in addition to the International Shoe Co. case a decision of the Supreme Court in the case of *Standard Fashion Co.* v. *Magrane-Houston Co.* (258 U. S. 346). This is definitely the law of the land.

The language in the amendment, it will be noted, follows closely the purpose of the Clayton Act as defined by the Supreme Court in the International Shoe case."

Continuing, the House Report on the Celler Bill stated that "the bill modifies the present law so as to remove any possibility of an interpretation that would prohibit inconsequential acquisitions of stock or assets."[25]

House Report Criticizes Narrow Language of Clayton Act

Criticizing as excessively restrictive the original Clayton Act Section 7 in respect of stock acquisitions, the House Report continued:[26]

. . . this language, but for limiting interpretations by the courts, might have prevented any use of stock purchases to unite small corporations engaged in the same line of business even though these corporations were so small and their other competitors so numerous that the acquisition would have made no perceptible change in the intensity of competition in any line of commerce in which such corporations were engaged. The present bill eliminates this language and provides instead that an acquisition of stock or assets shall be prohibited—"where in any line of commerce in any section of the country the effect of such acquisitions may be substantially to lessen competition."

Small companies which cannot produce the specified effect upon competition are not thereby forbidden to acquire either stock or assets.

Similarly the Senate Report declared[27] that

it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies [or] prevent all acquisitions between competitors [or] prevent any local enterprise in a small town from buying up another local enterprise in the same town.

Both the Senate and the House Report emphasized that the Celler Bill, which became the Celler Act, does not forbid acquisitions of stock or assets from a company in a bankrupt or failing condition.

Thus the Senate Report stated:

The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out.

The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue. On this specific point the Supreme Court, in the case of *International Shoe Co.* v. *Federal Trade Commission* (280 U. S. 281) said:

". . . a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially (303) lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this court suggested in *United States* v. *U. S. Steel Corp.* (251 U. S. 417, 446-447), would 'seem a distempered view of purchase and result.' See also *Press Ass'n* v. *United States* (245 Fed. 91, 93-94) (Id. pp. 302-303)." .

It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."[28]

How the Federal Trade Commission is likely to interpret "may be substantially to lessen competition" in Clayton Act Section 7 as amended by the Celler Act can reasonably be anticipated from the Commission's interpretation in Clayton Act Sec-

23. House Report, 7.
24. House of Representatives Report No. 596, 80th Cong. 1st Sess., 7.
25. House Report, 7.
26. House Report, 7-8.
27. Senate Report, 4.
28. Senate Report, 7. To the same effect see House Report, 6.

tion 2, price discriminations, of the words[29]

> where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Interpreting these words in Clayton Act Section 2, price discriminations, the Federal Trade Commission has stated:[30]

> The Commission does not wish to be understood as stating that injury to a competitor in all cases constitutes injury to competition. The loss of a single sale as a result of price discrimination obviously constitutes an injury to the competitor who lost the sale, but it does not automatically follow that competition is injured thereby.

To illustrate this point, the Commission cited[31] a case in which two companies operating as a unit

> had but one domestic competitor. They sought to drive this competitor out of business, and one of the means used was sectional price discrimination. Injury to this competitor sufficient to threaten its continued existence was obviously injury to competition, for this single competitor furnished the only competition the respondents had.

The Court of Appeals accordingly affirmed the Federal Trade Commission's order prohibiting this sectional price discrimination.[32]

O'Mahoney Bill Vetoed by President

The so-called O'Mahoney Bill, S. 1008, which has several times been mentioned in this article, was passed in both branches of the Congress, but on June 16, 1950, was vetoed by the President. On June 26, 1950, Senator Edwin C. Johnson, Chairman of the so-called Watchdog Subcommittee of the Senate Interstate and Foreign Commerce Committee, submitted to the Federal Trade Commission the following extract from the House Managers' statement which had accompanied the Conference Report on that bill:[33]

> Competition is a contest between sellers for the business of a buyer. In such a contest one seller gets the order while other sellers lose the order. That is competition. The seller who did not get the order may feel injured, but that does not mean that competition has been injured. In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. "Competition," Mr. Justice Holmes observed, "is worth what it cost."
>
> We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition.

The Senate Subcommittee asked the Commission "Does the Commission concur in this view of the meaning of 'competition'?" To which the Commission replied[34]

> Yes, insofar as the distinction between injury to competitors and injury to competition is concerned, see answer to question 10 [being the Commission's answer contained in the several paragraphs hereinabove quoted].

The Federal Trade Commission's answers quoted in the several paragraphs hereinabove would seem even more applicable to the words "may be substantially to lessen competition" in Clayton Act Section 7 as amended by the Celler Act, because the Commission in those answers was interpreting words in Clayton Act Section 2, price discriminations, which come much closer to referring to injury to competitors than do the words "may be substantially to lessen competition" in Clayton Act Section 7 as amended under the Celler Act.

Reference has been made several times in this article to the present national emergency, and the resulting need for speedy and correct action by the Federal Trade Commission in interpreting and applying Clayton Act Section 7 as amended by the Celler Act.

How pressing this need is becomes plain when one considers how numerous and important are the shifts of plant facilities which may become necessary in the weeks and months immediately ahead.

President Truman is calling for an increase by the end of this year

29. 38 Stat. 730; 49 Stat. 1526; 15 U.S.C. §13.
30. Aug. 14, 1950, Letter of James M. Mead, Chairman, Federal Trade Commission, to Senator Edwin C. Johnson, Chairman, Senate Committee on Interstate and Foreign Commerce, also other Commission statements, in Confidential Committee Print, 1950, Watchdog Subcommittee on Freight Absorption and Pricing Practices, Senate Committee on Interstate and Foreign Commerce, "Study of Federal Trade Commission Views on Freight Absorption" (hereinafter called 'Senate Watchdog Subcommittee Print' "), 8-9.
31. Senate Watchdog Subcommittee Print, 8.
32. *E. B. Muller & Co. v. Federal Trade Commission* 142 F. (2d) 511, CCA 6C.
33. Senate Watchdog Subcommittee Print, 9; October 14, 1949, 95 Cong. Rec., Part 11, 14604.
34. Senate Watchdog Subcommittee Print, 9.

of more than 7 per cent in the annual rate of total output, and for an increase in the next five years of at least 25 per cent of the total productive strength of the national economy. He emphasizes[35] that

> The character of our economy must now be changed rapidly to meet the new challenge. Those types of production which support the expanding defense effort must be greatly enlarged. The part of our total national output going into defense should rise from 7 per cent to nearly 18 per cent, during the year 1951. By the end of the year, the expanding defense program may be absorbing one-third or more of some basic materials. . . . Businessmen must make sacrifices . . . They must be willing to withdraw from enterprises which are nonessential and wasteful during a national emergency.

Expounding this same theme, the President's Council of Economic Advisers states:[36]

> Economic mobilization means a vast and rapid shift in the use of our resources, to which every policy must be attuned. This shift is executed throughout the economic system . . . Speed is of the essence in economic mobilization . . . In economic mobilization, tardiness has a cumulative effect because of the interrelationship among all the parts. Delay at one point generates even more delay at succeeding points. Indecision at one point promotes apathy at another . . . We must strive even harder to lift total production, although we must drastically alter its composition.

These immediate and drastic changes in the economy call for shifts of plant facilities that may involve numerous and important acquisitions of assets.

Unless there is some procedure by which businessmen and their lawyers can speedily and correctly ascertain what acquisitions are lawful and what acquisitions are unlawful, a paralyzing weight of uncertainty will fall upon the economy at just the time when it is bearing all the strains and stresses of the greatest national emergency in history.

The Federal Trade Commission has several times indicated its willingness to try to inform businessmen and their lawyers regarding the Commission's interpretation of difficult and perplexing legislation which the Commission is charged with administering.[37]

The Commission in its administration of Clayton Act Section 7 as amended by the Celler Act may well emulate a procedure which for several years the Antitrust Division of the Department of Justice has been following in its Merger Unit, which reviews mergers under the antitrust laws, so as to afford timely warning to businessmen and their lawyers as to mergers that will be regarded as illegal combinations.

In the release by the Department of Justice on March 19, 1947, announcing the formation of this Merger Unit,[38] it was stated:

> Businessmen are invited to present all the facts concerning any merger proposal or acquisition to the new unit for examination. Interested parties will receive prompt consideration of the matter and the views of the Department of Justice as to whether it would take action under the antitrust laws, if the proposed merger or acquisition were consummated.

This Merger Unit in the Antitrust Division was inaugurated by Attorney General Tom C. Clark, now an Associate Justice of the Supreme Court of the United States.

Emphasizing the need for this Merger Unit, Attorney General Clark stated:[39]

> The business community generally has indicated its desire that the Department establish some preexamination procedure with reference to proposed mergers which will enable it to obtain the views of the Department of Justice upon the submission of the facts of the proposed mergers in advance of the completion of such transactions. This procedure will avoid the long-drawn out and wasteful litigation which would be involved if no preexamination procedure were established.

35. Economic Report of the President to Congress, January 12, 1951, 6, 9.

36. Annual Economic Review by the Council of Economic Advisers, January, 1951, 84, 85, 114.

37. See July 23, 1937, Letter of W. A. Ayres, Chairman, Federal Trade Commission, to Congressman Wright Patman and "Informal Opinions of the Federal Trade Commission on Questions Relating to the Robinson-Patman Act", 81 Cong. Rec. Appendix Part 10, 2336-2341; see also August 14, 1950, Letter of James M. Mead, Chairman, Federal Trade Commission, to Senator Edwin C. Johnson, Chairman, Senate Committee on Interstate and Foreign Commerce, Note 30 above; see also November 20, 1950, Letter of James M. Mead, Chairman, Federal Trade Commission, to Senator Edwin C. Johnson, Chairman, Senate Committee on Interstate and Foreign Commerce, also other Commission statements, in Senate Report No. 2627, 81st Cong., 2d Sess. December 31, 1950, Senate Committee on Interstate and Foreign Commerce, "Report on the Status of Competitive Freight Absorption".

38. Hearings on H.R. 515, Amending §§7 and 11 of the Clayton Act, Serial No. 3, 143, before Subcommittee No. 2, Committee on Judiciary, House of Representatives, 80th Cong., 1st Sess.

39. See Note 38 above.

Crimes Aboard American Aircraft
(Continued from page 260)

Court explain how the Congress could take away from the landowner those private rights to a more or less indefinite height in the air space which were granted to the landowner under the North Carolina statute.

Court Appears To Think Air Space Is Federal Territory

The only logical conclusion which can be drawn from the entire opinion of the Court in the *Causby* case is that the Court believed the navigable air space to be federal territory and not part of the territory of the states below. If this be true, then the power of Congress to dispose of and regulate the use of this federal air space is clear under the provisions of Article 4, Section 3(2), of the Constitution. It is difficult to read any other definitive view into the language of the majority opinion of the Court and the necessary implications that must be drawn therefrom. Hence, the gravest questions exist as to whether the several states have any jurisdiction, criminal or otherwise, in the navigable air space over their lands and internal waters.

This difficulty is rendered even more serious when the *Causby* case is construed in connection with *United States* v. *California, supra*. In the latter case, as pointed out above, the Court went out of its way to hold

that the theory on which the territorial waters or marginal sea became part of national territory did not come into being until after the United States became a nation. Similarly, it has been argued that it was not until the development of the art of flight, long after the United States became a nation, that navigable air space could be considered as part of national territory, as such navigable air space was prior to that time completely unusable by man. Capable commentators had in fact made this argument and had insisted that navigable air space was exclusively federal territory, even before the decision in the *Causby* case. See Frederic P. Lee, "The Air Domain of the United States," in: *Civil Aeronautics. Legislative History of the Air Commerce Act of 1926, Corrected to August 1, 1928,* Washington, U. S. Govt. Print. Office 1943; see also Clement L. Bouvé, "State Sovereignty or International Sovereignty Over Navigable Airspace?", 3 *Journal District of Columbia Bar Association,* 5 (1936).

The grave doubts cast by the decision in the *Causby* case on the regulatory and criminal jurisdiction of the several states in the navigable airspace above their respective lands and internal waters should be promptly removed by an act of Congress. If the Congress is of the opinion that the navigable airspace is not exclusively federal territory, then no possible objection could be raised to an act confirming in the several states their respective territorial rights in the navigable air space, subject to the same constitutional rights which the Federal Government has in the surface territories of the several states. Even if the Congress believes that the navigable air space is now exclusively federal territory, having been acquired through user by the Federal Government after the United States became a nation, nevertheless the Congress should take advantage of its undoubted authority to dispose of such federal territory and should grant to each state the navigable air space over such state, subject to necessary reserved federal regulatory powers. In this way, no matter what may be the present legal territorial status of the navigable air space as between the Federal Government and the respective state governments, the present confused position can be clarified and the jurisdiction and competence of the several states to define and punish crimes committed in the navigable air space, as well as the regulatory powers of the states in such air space, can be confirmed and made certain.

If this is not done, it is clearly necessary that a federal statute be passed defining and providing for the punishment of crimes committed in aircraft passing through the navigable air space of the United States.

Conclusion

The problems stated above are not, theoretical. They are very practical, affecting as they do the competence and functions of public officials and of both federal and state courts. These problems have been considered in part by the Section of Criminal Law, resulting in the adoption by the American Bar Association in 1950 of a resolution urging revision of the present statutes so that the jurisdiction relative to crimes committed aboard surface vessels be extended to include crimes committed aboard aircraft. No action has been taken by the Congress of the United States. It is respectfully suggested that this question and the other questions raised in this article might be further considered by the Section of Criminal Law and the Committee on Aeronautical Law of the American Bar Association.

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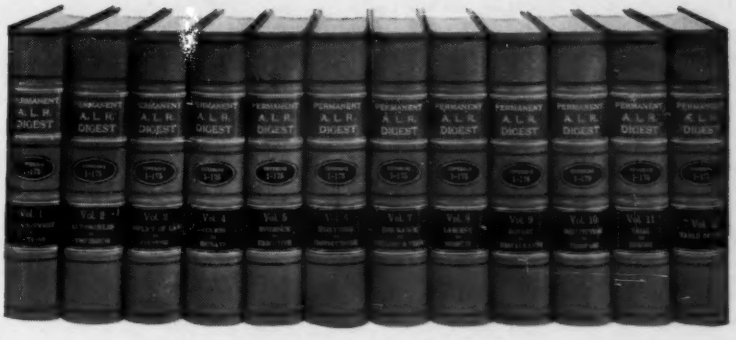

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